No. 3682.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

United States of America,
Appellant,

vs.

California Midway Oil Company, Columbus Midway Oil Company, Thirty-Two Oil Company, L. B. McMurtry, J. M. McLeod, and Standard Oil Company,
Appellees.

BRIEF OF APPELLEES.

GEO. E. WHITAKER,
JORDAN & BRANN,
ROBERT M. PEASE,
U. T. CLOTFELTER,
Kerckhoff Bldg., 6th & Main Sts., Los Angeles,
Solicitors for Appellees.

PARKER & STONE CO., Law Printers, 232 New High St., Los Angeles, Cal.

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(Note:—Figures in parentheses refer to record pages.)

I.

STATEMENT OF THE CASE.

As the portion of appellant's brief styled "Statement of the Case" does not comply with rule 24 of this Court in that it does not state the questions to be decided or how they arise; and as appellees cannot agree therewith, they deem it necessary to make herein a statement of the case.

This is an appeal from a decree dismissing a bill in equity filed by appellant for a decree (a) that title to the N. W. ¼ of Sec. 32, Tp. 31 S., R. 22 E., M. D. M. (unpatented) is vested in appellant free and clear of all claims of appellees; (b) that appellees be perpetually enjoined from holding possession of said land and operating it for oil; (c) that a receiver be appointed; (d) that appellees account for all oil and gas removed from the land prior to filing of the bill; (e) for damages for trespass; and (f) such other relief as may appear to be equitable. (14-17).

The sole ground upon which the right to such decree is predicated in the bill is fraud.

That fraud is defined in paragraph X of the bill, a full and correct summary of which is:

That the placer oil location under which appellees claim was not made by the persons named in the location notice for their own use and benefit but for the use and benefit of L. B. McMurtry, to enable him in the form of law, but in violation thereof, to secure for himself more than twenty acres of public land in one location.

This charge of fraud is concisely summarized in the opinion of the trial court thus:

> "It is the government's position in this case that it was the intention of the makers of the powers of attorney and of McMurtry to circumvent the law by permitting McMurtry to secure the location of more than twenty acres in one claim, and that there was, in effect, a conspiracy between McMurtry

and the makers of the power of attorney to violate the statute."

It is true that the bill alleges that the location was made for the use and benefit of "L. B. McMurtry or some other person than said persons named in the location notice." But as the government offered no evidence to identify any person than McMurtry as the person for whose use and benefit the location was alleged to have been made the "other person" referred to in the bill must be disregarded.

Answers in due time were filed which, among other things, denied specifically and categorically the fraud charged (21-32; 45-52; 71-89). The answers of the Associated Oil Company and the Standard Oil Company are not included in this record as the suit has been finally dismissed as to them.

Upon the issues thus made a trial was had upon the merits, which, according to the opinion of the trial judge reported in 259 Fed. 341-355, resulted in a record "exceedingly voluminous, consisting of many thousand pages of testimony and many exhibits."

The trial judge, District Judge Bean, after a most thorough and painstaking consideration of the record, wrote an exhaustive opinion which shows that the fraud charged had not been proven; and, accordingly, made and entered a decree dismissing the bill.

In that opinion he incorporated a full and impartial summary of the testimony of all of the witnesses and all of the exhibits. The summary of the testimony

of the witnesses is omitted from the opinion as published in the Federal Reporter. Because of this and of the fact that counsel for the government concede the summary of evidence in that opinion to be full, fair, accurate, and impartial by their failure to criticize it in any manner or to disagree with it in any particular in their brief on file herein, we print the entire opinion as Appendix A hereto, that this Court may have the benefit thereof and observe how thoroughly the trial Court considered the case in all of its aspects, including all those presented in the brief of appellant.

District Judge Bean in his opinion confined the discussion to the fraud charged. This because no other question was before him or is in the case.

It is true that in paragraph VII (7) of the bill it is alleged:

> "None of said defendants, nor any other person, was, at the time said land was withdrawn on the 27th day of September, 1909, as hereinbefore set forth, a bona fide occupant or claimant of said land and in the diligent prosecution of work leading to the discovery of oil or gas thereon or therein, *under a valid, subsisting location under the mining laws of the United States.*"

The inclusion of the italicized words admits that appellees were such occupants and claimants engaged in said work but for the alleged fraud in the location.

So that, on this appeal if there is any question properly before this Court, it is solely this:

Does the evidence prove the fraud charged?

That the question stated is the only one in the case is proven by the fact that appellant in its brief says: "Drilling for oil was going on upon the land at the date of said withdrawal order" (p. 2); and, "In January 1909, the California Midway Oil Company" (one of the appellees) "commenced drilling for oil on the south sixty acres of the northwest quarter and continued such work to discovery" (p. 7).

II.

BRIEF OF THE ARGUMENT.

1.

INTRODUCTORY.

The record before this Court does not affirmatively show on its face that all of the evidence upon which the decree appealed from was based is before this Court and, hence, this Court must presume that there was sufficient evidence before the trial court to justify its decree (as will be shown hereafter).

Appellant's brief in its entirety is devoted to an attempt to show (a) by meager, fragmentary and biased extracts from the record and (b) by citation of a part only of the decisions which must be considered in arriving at a correct decision herein, that the conclusion of the trial court from the admitted facts should have been different.

But preliminarily these matters are passed and herein is first discussed the case on its merits.

2.

THE EVIDENCE IN THIS RECORD WHOLLY FAILS TO PROVE THE FRAUD CHARGED—IT IS A CONSPICUOUS EXAMPLE OF FAILURE OF PROOF.

The opinion of the trial judge so conclusively demonstrates the correctness of the foregoing heading by an unusually exhaustive recital of all of the evidence, including all of the parts thereof incorporated in appellant's brief; by clear-cut and forceful reasoning; and by ample citation of authority (none of which are mentioned in the brief of appellant), that no further argument is necessary, except to show that the position taken by appellant in its brief is wholly untenable.

To do this effectively it is necessary to direct the attention of this court to some well-settled rules of law by which the sufficiency of evidence offered to establish fraud is to be tested. No reference to these rules is found in appellant's brief.

> "Judge Van Fleet, now on this Circuit, and formerly of the Supreme Court of California, when upon that bench, said in Truett v. Onderdonk, 120 Cal. 581, 588, 53 Pac. 26, 29: 'The presumption is always against fraud, a presumption approximating in strength to that of innocence of crime.' "
>
> U. S. v. So. Pac. Co., 260 Fed. 520.

Judge Story said:

"The onus probandi is on the plaintiff. Fraud is not presumed. It must be clearly and fully established. Suspicion is not enough. Doubtful circumstances are not enough. The evidence will not be nicely weighed."

Sanborn v. Stetson, 21 Fed. Cas. 314.

Mr. Justice Harlan said:

"The law presumes, in the absence of evidence to the contrary, that the business transactions of every man are done in good faith and for an honest purpose; and any man who alleges that such acts are done in bad faith or for a dishonest and fraudulent purpose takes upon himself the business of proving the same. * * * It devolves on him who alleges fraud to show the same by satisfactory proof."

Jones v. Simpson, 116 U. S. 609.

Mr. Justice Brewer in assigning the reason for his ruling that the evidence in the case before the Court did not prove the fraud charged, said:

"They (the facts) may leave a doubt but they do not bring assurance of certain wrong."

U. S. v. Hancock, 133 U. S. 193.

"If the circumstances proven are just as consistent with honesty and good faith as with fraudulent intent the inference of fraud is not warranted" (citing cases). "To establish fraud, the proof must be clear, unequivocal, and convincing" (citing

cases). "Proofs which only create suspicion are not sufficient to sustain a finding of fraud."

In re Hawks, 204 Fed. 309, 316.

Said the court in U. S. v. Barber Lumber Co., 172 Fed. 961, that evidence which makes only for "mere inference, conjecture or suspicion" is not enough to prove fraud.

In the case last referred to the Court answered the claim of government counsel that evidence of circumstances following the entry (like those here), failed to prove the fraud charged by saying:

"It is just as reasonable and certainly more just to suppose that the entryman or entrywoman, in making the application to purchase, acted as they each testified, honestly and in good faith, than it is to conjure up some contrary theory, which necessarily assumes that all the witnesses in this case upon that question perjured themselves at the trial."

U. S. v. Barber L. Co., *supra*.

"If there be two inferences equally reasonable and equally susceptible of being drawn from the proved facts, one favoring fair dealing and the other corrupt practice, it is the duty of the court or jury to draw the inference favorable to fair dealing" (citing cases). "For fraud must always be proven, so that when the plaintiff's case goes no further than to establish a state of facts from which the inference of fraud may or may not be

reasonably drawn, he has failed to establish his charge."

Ryder v. Bamberger, 172 Cal. 789.

Cited in:

In re Hawkes, 204 Fed. 316,
U. S. v. Cal. Midway Oil Co., 259 Fed. 341.

These cases, and literally hundreds of others decided by various courts of last resort in this country and in England, simply state a rule of law that has been uniformly and unanimously applied everywhere in measuring the sufficiency of evidence to prove fraud.

This rule applies in suits between the government and citizens just as it applies in suits between citizens.

U. S. v. Trinidad etc. Co., 137 U. S. 160;
Kirk v. Hamilton, 102 U. S. 68, 76-7;
U. S. v. Chandler-Dunbar Co., 152 Fed. 41.

Properly to apply this rule to the evidence in this record there should be kept in mind what is actionable fraud in connection with the question of title to public land.

"The primary fraud lies in the filing of the application and the actionable wrongdoing of the claimant consists in *that which he did prior to and at the time of the making of his application and not what he did thereafter.*"

U. S. v. Kettenbach, 175 Fed. 463.

"The locations were either fraudulent at the time they were made or not at all, and it is to that question that the inquiry is to be confined."

U. S. v. Cal. Midway Oil Co., 259 Fed. 354.

> "All that it (the law) denounces is a prior agreement, the acting for another in the purchase. If when the title passes from the government no one save the purchaser has any claim upon it or contract or agreement for it the law is satisfied."
>
> U. S. v. Budd, 144 U. S. 154.

The same rule is stated in:

U. S. v. Detroit L. Co., 200 U. S. 337,
U. S. v. Mundy, 122 U. S. 182,
Williamson v. U. S., 207 U. S. 425,
U. S. v. Kettenbach, 208 Fed. 214.

The cases of Pereles v. Weil, 157 Fed. 419, and Arnold v. Weil, 157 Fed. 429, are especially illuminating on this point. In both cases Judge Sanborn wrote the opinions.

In the Pereles case a writ of habeas corpus was granted because the indictment omitted to state that *before the entries mentioned in it were made* the entrymen had made an agreement to make the entry for the use and benefit of the company and not for themselves.

In the Arnold case such writ was refused because the indictment stated the existence of such prior agreement.

In the two opinions Judge Sanborn took much pains to show that his rulings in them were compelled by settled authorities which uniformly held that no crime is committed in the absence of a prior agreement.

The same proposition was stated in another way in U. S. v. MacIntosh, 85 Fed. 333, thus:

That fraud in acquiring title to a tract of public land is not perpetrated "when there was no *prior conspiracy* whereby he (the entryman) became the mere agent of the corporation for the purpose of procuring title for it."

It was because the evidence proved the existence of such pre-location agreement that appellants' leading cases cited on page 42 of their brief held the locations in question to be fraudulent and void. Those leading cases are Nome & Sinook Co., v. Snyder, 187 Fed. 385, and Cook v. Klonos, 164 Fed. 529.

In the Snyder case the opinion recites expressly that five men entered into an agreement on June 4, 1899 to locate placer mining claims thereafter in Alaska; that by the agreement the interest of each party in claims to be located was fixed so that some were to have more and others less than a twenty-acre interest; and that the land involved was located under that agreement. The Court applied the prior agreement rule and properly held the location void.

In the Cook case the Court in its opinion said that it held the location fraudulent because:

> "E. T. Barnett testified that in March, 1905, *before the location was made,* he had an understanding with Cook and Rydenour as to ownership in the claims."

Then, after showing that the evidence was that by that prior agreement Barnett was to have a three-eighths interest in each claim located, two others were to have a third interest, etc., the opinion continues:

> "This distribution of interest by Barnett, who appears to have been the moving spirit to secure possession of the ground, *was made before the location of the claims.*"

It has been held upon the abundant authority cited in the opinion, that persons may lawfully locate claims through and by an agent. See U. S. v. Dominion Oil Co., 264 Fed. 955, in which many cases are cited.

The cases of U. S. v. Wells, 192 Fed. 870, and U. S. v. Woolley, 262 Fed. 518, as being contrary to the foregoing authorities are not in point.

The Wells case involved the sufficiency of an indictment for conspiracy under Sec. 5440 of U. S. Rev. Statutes.

The Woolley case charged fraud and deceit in the making of proofs under the Homestead law.

The rules of law settled by the foregoing authorities, applied to the evidence in this case conclusively establish the correctness of the conclusion of the trial Judge that the evidence wholly failed to establish the fraud charged.

But at the risk of prolixity, specific application of the rules to the evidence will now be made, as in this way it will clearly appear that appellant's brief is built upon a false premise.

First: Two inferences have been drawn from this evidence—one in favor of fair dealing (District Judge

Bean) and the other in favor of corrupt practice (Secretary of Interior Payne). Both these men were acting as a judicial officer of the United States and both are able lawyers of long judicial experience. It is admitted for the purposes of the argument that these opposite inferences are reasonably drawn. The opinion of District Judge Bean is attached hereto as Appendix A, and the opinion of the Secretary of the Interior is attached to the appellant's brief as an appendix.

That the two decisions are based upon identically the same evidence appears from the Secretary's statement of what the evidence before him was, at the bottom of page 68 and the top of page 69 of appellant's brief. United States v. California Midway Oil Company, Equity B-10, referred to therein is the title and number of this case in the trial court.

The very fact that two opposite inferences have been drawn from the same evidence by these eminent lawyers conclusively establishes that the fraud here charged has not been shown by that character of evidence which the law requires, namely: "Clear, convincing, unequivocal, and satisfactory."

These two opinions conclusively show that upon this evidence the existence of the fraud is in doubt, regardless of which inference drawn therefrom is correct. Therefore, it is the duty of this Court to affirm the trial court and to hold that there is a failure of proof. There is no alternative under the law as has been hereinbefore shown.

Second: It is certain that prior to January 1, 1909, the date the location involved was made, there was no agreement express or implied between the locators or any of them and McMurtry, or anyone else, that the locators were to act merely as the agents for McMurtry or any other person.

On pages 24 to 32 of appellant's brief is set forth some fragmentary excerpts from the testimony, apparently for the purpose of showing the existence of such an agreement.

But even in this, no mention of such agreement is made and from this no inference that it was made can be drawn.

The complete answer to any deduction of counsel for appellant from the evidence set forth on said pages of their brief would have appeared had counsel set forth in their brief all that the witnesses said on the subject. Because they failed to do this it is necessary that such testimony be set forth herein. The parts thereof in italics show significant omissions by the government in its excerpts from the testimony.

R. B. WELCH:

"In December, 1907, I resided in West Haven, Conn. and was a time clerk. I signed power of attorney to L. B. McMurtry at request of my brother-in-law, John B. Thickens (250). I signed papers in respect to this matter. I trusted to my brother-in-law and signed whatever he asked me to sign. I was not familiar with the laws of the United States governing the making placer mining

claims. I supposed I was locating a claim and that some day it would be worth some money (251). *If Mr. Thickens had said it was necessary for me to advance some money I suppose I would have done so.* (252). *My brother-in-law did not ask me to sign so that Mr. McMurtry would be given a chance to make some money"* (268).

WM. A. KEENAN:

"In December, 1907, I was a clerk for Nixon & Thickens. I knew it was possible for an American citizen to locate lands (610). *I knew this power of attorney to McMurtry was going around the office giving him power to locate lands for those who signed it and I was afraid Mr. Thickens was going to leave me out of it. If he had not asked me I would have asked him to let me in on it.* (611). *Mr. Thickens was my boss and I had implicit confidence in him so did not inquire about this business* (617). *In the conversations with Thickens at the time I signed the power of attorney nothing was said or intimated about my name being used in the interest of McMurtry or Thickens. I never heard Thickens make a statement to that effect to any of the other boys in the office. I did not intend that the power of attorney should be used for the benefit of McMurtry or Thickens* (621).

EUGENE METZ:

In December, 1907, I was a salesman for Nixon & Thickens. I signed a power of attorney to McMurtry. Thickens asked me if I would give a friend of his power to locate some lands for me

and try to find oil. He said if he found oil I would make a lot of money out of it. Naturally I became interested and I was willing to sign. That was the only conversation I had before I signed it. (587). *I understood I was a locator in my own right.*" (594).

WM. A. MAHR:

"In December, 1907, I was a salesman employed by Nixon & Thickens. Thickens introduced me to L. B. McMurtry (525). I was not familiar in detail with the public land laws. I knew there were such lands that could be located, and in a general way knew that there were laws governing such locations. I signed a power of attorney to Mc Murtry (256). *Thickens asked me to sign it to give McMurtry power to locate lands for me in California.* We had been talking about it day in and day out long before I ever signed it (527). *I had many conversations with Thickens regarding the possibilities of oil lands in California and McMurtry's ability as a locator and I was anxious to sign the power of attorney because I wanted to associate myself with an organization that was going to try and develop and locate these lands. Thickens had never said anything to the effect that he was asking me for the use of my name to take up lands for McMurtry nor was there any suggestion or insinuation made to that effect by Thickens or any of the other signers of the power that McMurtry was to have any interest of any kind in the lands that were located. At the time I signed this power I had no intention of permitting McMurtry or anybody else to use my name for*

locating lands for themselves, nor did I intend to assist anybody in obtaining more mineral land than they were entitled to. I had no other intention than that McMurtry as my attorney should legitimately and honestly locate lands for me and my associates as could be legally located for me and in my name (538). *I would not have signed the power of attorney if I had known McMurtry or any person acting for me intended to use my name to defraud the Government.*" (543).

HERBERT M. WALKER:

"In December, 1907, was a salesman for Nixon & Thickens and was not familiar with the United States land laws. I am the Herbert M. Walker who gave McMurtry the power of attorney to locate oil on mineral land (624). Thickens said he had a friend by the name of McMurtry who was well up on oil lands and he believed if I would give him a power of attorney to locate oil lands for us it would prove valuable for us and, therefore, I gave him the power of attorney (625). *At the time I signed the power of attorney nothing was said by Thickens to me of the subject of lending my name so that McMurtry could locate lands for his own benefit nor was there any insinuation to that effect, nor any agreement that McMurtry would have any interest in any of the lands that might be located in my name.*" (660).

F. H. ROMAINE, JR.

"In December, 1907, was employed by Nixon & Thickens as salesman. Had never taken up any public domain and the only information I had con-

cerning the requirements and privileges under the mining laws was what Mr. Thickens explained to me at the time I signed the power of attorney to McMurtry. (572). Thickens brought the power to me and he said there was no question but that the transaction was clean and above the table and all that, and of course he was one of my employers and naturally I thought that there could not be anything outside of what he said so I signed the power of attorney after he had explained it to me. *There had been several conversaions about the matter before* (573). *Thickens did not ask me to sign so that McMurtry could get the lands for himself. He located the lands for me. Nothing was said about McMurtry, Thickens or anybody else having an interest in case they were valuable. I never had any intention that he should use my name for the purpose of obtaining from the Government any interests in mineral lands or minerals for himself* (583). *There was no statement by Thickens that I would be giving McMurtry any interest in the lands located. He did not say anything about accommodating McMurtry.*" (586).

C. RUPERT WALKER:

"In December, 1907, working as bookkeeper for Nixon & Thickens. Did not then know McMurtry (595). I signed a power of attorney to McMurtry. Thickens presented it to me. *I had full confidence in Thickens* (596). *Before I signed the power of attorney Thickens did not say that any money that came out of it would belong to McMurtry or that any land I might get out of it*

would, or that any land or money would belong to anybody but myself" (608).

H. E. BASHORE:

"I was employed by Nixon & Thickens as office manager. *I considered Thickens a confidential friend* (676). *Relied a good deal on Thickens, he being a personal friend. I never felt that he would ask me to do anything but what was right.* (677). *When I signed that power of attorney Thickens did not tell me how he or anybody was going to be benefited by it that I recall* (701). *I had no intention when I signed that power of attorney to aid Thickens or McMurtry to cheat or defraud the Government"* (702).

Nothing thus far to prove an ante-location agreement. This cannot be questioned.

Looking at the testimony of the only other persons who could have been a party to such an agreement (to whose testimony on this important subject no reference is made by the government) no change in the matter will appear except denials that any such or any other agreement was made.

The other persons are McMurtry, Powell, Thickens and Thorn.

L. B. McMurtry:

"I caused these original powers of attorney to be prepared. I was not present when any of these people executed these powers of attorney (777). I had no conversation with any of the persons who signed

them in regard to location of lands thereunder, nor did I by writing or otherwise communicate to them any of my plans or intention (778). I did not ask them (Powell, Thickens, Thorne or Searles) to get individuals whom they could influence or control in the event locations were made in their names and made no suggestions as to any particular person or persons (798). I can assure Your Honor that there never was a time, neither was there ever an occasion for me to use a dummy locator. It was something that had never occurred to me to use a dummy locator at any time or anywhere or under any conditions. I never thought of such a thing (820). I did not ever make a request of either one of the locators directly or indirectly to execute any kind of an agreement or declaration that the located properly belonged in whole or in part to me or that I had any interest therein" (799).

Powell said:

"Nothing was said in this conversation with McMurtry about locating oil lands in California as to his wanting to use my name in order to locate the lands for his benefit or that he might have an interest in them, nor did I make any such suggestion in soliciting Taylor and Meinecke to sign, or suggest that they act as dummy locators for McMurtry or anybody. No suggestion or intimation was made to me by McMurtry that he wanted to use the names of thirty-two people or any people to take up land in California for his own use and benefit. This subject was never broached at any time by McMurtry, Searles, or anybody on behalf of Searles or McMurtry." (329).

Thorne said:

"I heard McMurtry ask Thickens, Searles and myself if we could get some of our friends to sign power of attorney. All that I remember is that he had made up his mind to go west and had secured the blanks, and if we would sign them he would get locations for us. McMurtry offered to locate the lands for us and we accepted the offer." (669).

Thickens said:

"In these talks I had with McMurtry prior to signing these powers of attorney he did not tell me that he wanted me to go out and get a lot of people to sign so that we could get control or so that he could get the lands for himself or for me, positively not. He did not say that he wanted to get dummy locators (742). I presented the power of attorney to several persons and explained to them the whole proposition as I understood it; that there was a chance for them to locate some lands in California; that McMurtry was an expert oil man and understood all about oil lands, and there was a chance for them to locate some lands and possibly to make some money out of it." (739).

In view of this positive and unequivocal testimony this Court must agree with Judge Bean, who said on this point:

> "The evidence of the New York locators, as well as that of McMurtry and his associates, is clear that there was no express understanding or agreement, at the time the powers of attorney were executed, or prior thereto, or at any time, that they should be used for McMurtry for a fraudulent

> purpose, or for any purpose than to make, develop and dispose of mining locations for the use and benefit of the locators, and in my judgment such understanding is not to be inferred from the circumstances."

The claim of the government to the contrary cannot be sustained, except "to conjure up some theory which necessarily assumes that every witness perjured himseld on the trial"; and there is no basis in the evidence for such assumption.

The government made no attempt to impeach any witness and did nothing else to impugn the veracity of any of them. The utmost that the government claims in its brief is that they should be disbelieved because when they (the locators) testified they knew that a large amount of money had been derived from their locations. But the complete answer to this is that it frequently occurs that men tell the truth on the winess stand even though they thereby suffer financial loss.

So much for the testimony concerning this transaction down to the date the location in controversy was made.

The next inquiry, logically, is concerning the circumstances relating to this transaction which occurred after the said location was made.

Those circumstances and the law with reference thereto were tersely, accurately, and forcefully summarized by Judge Bean in his opinion, thus:

"The evidence of the New York locators, as well as that of McMurtry and his associates, is clear that there was no expressed understanding or agreement, at the time the powers of attorney were executed, or prior thereto, or at any time, that they should be used for McMurtry for a fraudulent purpose, or for any purpose other than to make, develop, and dispose of mining locations for the use and benefit of the locators, and in my judgment such understanding is not to be inferred from the circumstances. But few, if any, of the signers knew McMurtry by sight or had any communication with him about the matter. They executed the powers of attorney at the request of either Thorn, Thickens, or Powell, in whom they had the utmost confidence, and upon whose representations they relied in so doing. They were led to believe that McMurtry was an honest man familiar with the mining laws, and that he intended to make locations for them and in their names, if he could find property open to entry. It is true they were not familiar with the mining laws and made no particular inquiry concerning same, nor after executing the powers of attorney did they manifest any particular interest in what had been done, if anything, thereunder, but signed such papers and receipts, and accepted such sums of money as were presented and paid to them from time to time. All this may well have been because of their confidence in their principal and his associates, and reliance upon the statements and representations made to them. The fact that their confidence was misplaced does not render their acts fraudulent, and although McMurtry's conduct subsequent to the

locations was not such as should have characterized the relations between a principal and his agent, he nevertheless at all times up to and for some time after the sale to the Associated Oil Company, and notwithstanding the indorsements on the checks and the other papers executed by the locators, treated them as the owners of the locations and dealt with them and the property as such. All contracts and conveyances made by him were made and executed in the name and for and on behalf of his principals. He recognized their rights or claim to the property by from time to time seeking and obtaining releases and acquittances from them, and by causing to be issued to them stock in the Pacific Oil Lands Company, the holding corporation, and obtaining their consent to the corporate meetings and distribution of dividends therein. In July, 1910, he freely acknowledged that, notwithstanding previous conveyances made by and to him, the property was in fact held in trust by the grantees for the locators, and was willing to execute and have executed declarations to that effect.

In making the locations and subsequent contracts in reference thereto, the fair conclusion from the evidence, in my judgment, is that McMurtry was acting for and on behalf of his principals and with no intention at that time of fraudulently acquiring the land or the proceeds thereof for himself. It was not until it became apparent that a large sum of money could be realized from the transaction that his avarice or cupidity seems to have influenced him to appropriate to his own use the bulk thereof, without accounting to his principals, and

in violation of his trust. Clearly his conduct after location and discovery and sale of the property, however wrongful it may be, cannot relate back to and characterize as fraudulent the execution of the powers of attorney or the locations made thereunder. Evidence in relation thereto was only admissible and can only be considered in so far as it tends to establish a fraudulent purpose at the time of the locations. United States v. Kettenbach, 208 Fed. 209, 125 C. C. A. 409. The locations were either fraudulent at the time they were made, or not at all, and it is to that question the inquiry is to be confined. The law permits locations of mining claims in the names of persons not present. Moore v. Hamerstag, 109 Cal. 122, 41 Pac. 805. When so made, all the right or title any one can acquire by the location vests in the persons located. The interest, whatever it is, thus acquired becomes theirs, to dispose of as they please. Whiting v. Straup, 17 Wyo. 1, 95 Pac. 854, 129 Am. St. Rep. 1093. When, therefore, a location was made by McMurtry in the name of his New York principals, they became immediately vested with whatever right or title such location gave, in the absence of fraud or bad faith, and such title was not changed or rendered fraudulent by the subsequent failure of McMurtry to account to them for the proceeds of the property disposed of by him under his power of attorney, or by any secret or undisclosed purpose he may have had with reference thereto. I conclude, therefore, that upon the first two points the findings must be for the defendants."

Just what counsel for the government urge in answer to the foregoing it is difficult to perceive from their brief.

They devote much space to what they call the Chicago locations on this land by McMurtry as attorney in fact, notwithstanding the fact that they admit on page 4 that this land was not so located, and the testimony of McMurtry forces that admission. He said:

> "In making the Chicago location I relied upon old stakes upon the ground. I found afterward by survey that none of the Chicago locations were actually made on this northwest quarter of section 32." (807.)

But even had the fact been otherwise, successive locations upon a tract of land is never a badge of fraud.

They say on page 6 that Thickens, Thorn, Searles and Powell assured the signers of the power of attorney that they would incur thereby no financial responsibility and cite record pages 739, 669, and 313.

Those pages contain nothing on the subject. Moreover, it has been hereinbefore shown by testimony of these men that McMurtry never suggested such a thing; that he never talked with any locator who signed the power until long after the location was made. These things are not mentioned in appellant's brief.

Mention is made of the circumstance that McMurtry, as attorney in fact for the locators, deeded the land to Claflin, his attorney, in December, 1909, and on the next day Claflin made deed to McMurtry. But,

again, they do not mention the fact that this was done by McMurtry solely on advice of his attorney, Claflin, who thought it made for convenience; and that McMurtry did not have any intent to thereby divest the locators' title. (839.)

Another circumstance dealt with at great length in appellant's brief relates to the location of fourteen claims in the names of the New York locators by one Sue Greenleaf, with permission of McMurtry. However, in all that is said on the subject there is no mention of the fact that the evidence on this matter is that Sue Greenleaf made these locations under agreement with McMurtry that she would provide the funds for developing the land and in consideration therefor the locators were to convey to her a substantial interest in the land, retaining, of course, the balance for themselves. (759, 760, 812, 813.)

On pages 32 to 41 of appellant's brief the claim is made that the locators did not make inquiry about the business and some excerpts from the testimony of the locators are set forth on the matter. But in these excerpts, like those heretofore referred to, there is omitted all of their testimony in the record which shows that some of them did actually and actively inquire for information about the business from the persons they would naturally turn to for information and that the others explained that they did not inquire because they left the matter entirely in the hands of some person in whom they had implicit confidence.

Some of the omissions from the said excerpts are these:

Locator Welch said:

"John B. Thickens is my brother-in-law (250). I inquired of these lands of Thickens and he told me they were being taken care of by McMurtry (277). I relied in this matter entirely on Thickens." (259.)

Locator Keenan said:

"Mr. Thickens was my boss and I had implicit confidence in him, so I did not inquire about this business." (617.)

Locator Metz said:

"I trusted McMurtry so made no inquiries (589). McMurtry was a friend of Thickens, my employer." (587.)

Locator Mahr said:

"The reason I made no inquiry of McMurtry or Thickens concerning this was I trusted McMurtry as an agent. He knew that business thoroughly and I knew that when anything of importance came up he would notify me (540). I had known him through Thickens for a long time; had been given to understand that he was a man of wonderful character and an absolutely honest man; and I had no reason to doubt that he was not acting in good faith with me." (542.)

Testimony of other locators to the same effect could be quoted, but enough is given to show (a) that the quotations from the testimony, on pages 33 to 39 of

appellant's brief, do not correctly reflect the record and constitute a false premise upon which to base a conclusion; and (b) that had counsel for the government quoted the record fully, ample foundation for Judge Bean's statement that whatever of apparent lack of interest in the matter existed was due to "their confidence in their principal and his associates and reliance upon statements and representations made to them."

The last after-location circumstance to which counsel for the government refer (pp. 41-2) is that the evidence shows that McMurtry diverted to his own use the larger part of the moneys derived from these locations.

It is important to note in this connection that the testimony in the record about this subject relates to locations other than the one involved in this proceeding. Surely such circumstance does not clearly, convincingly prove the fraud charged in connection with the location here involved. And further, McMurtry's failure to account to his principals long after the locations were made cannot be made to relate back so as to characterize as fraudulent a location that was valid in all respects when made.

As Judge Bean forcibly puts the point:

> "Clearly his (McMurtry's) conduct after location, discovery, and sale of the property, however wrongful it may be, cannot relate back to and characterize as fraudulent the execution of the powers of attorney for the locations made thereunder. Evidence in relation thereto was only ad-

missible and can only be considered in so far as it tends to establish a fraudulent purpose at the time of the location." Citing 208 Fed. 209. (C. C. A.)

All of this conclusively appears from the fact, abundantly established by the testimony, that McMurtry in all of his transactions concerning the land located by him under the powers of attorney, including this land, recognized the interest of the locators in the business and their title to the lands in all things except the matter of accounting.

This is conceded by counsel for appellant all through their brief.

On pages 1 to 15 of appellant's brief is set up what purports to be a summary of all the evidence, which concludes with this statement:

"Upon this testimony the court found the location made in 1909 was for the use and benefit of the locators named therein."

The incorrectness of this claim is at once apparent from an examination of the opinion of Judge Bean, in which the testimony upon which his decree is based is summarized to the extent of at least one hundred pages. Manifestly, counsel for the government have left out in their fifteen pages of summary many things upon which Judge Bean's said conclusion is based.

For the reasons set forth in this subdivision of this brief, and for the reasons set forth at much greater length in the opinion of Judge Bean, it is confidently

submitted that the evidence wholly fails to prove the fraud charged and that the decree appealed from must be affirmed.

III.

The Evidence Fails to Prove That the Location Was Made for the Use and Benefit of the California Midway Oil Company.

The correctness of the proposition stated in this heading conclusively appears from what has already been said in subdivision 2 hereof.

IV.

It Does Not Affirmatively Appear Upon This Record That All of the Testimony Upon Which the Decree Was Based Is Before This Court.

The statement of the evidence to be included in the transcript on appeal, after the title of the court and cause, is this:

"Statement of evidence to be included in transcript on appeal in the above entitled cause.

This cause came on for trial on March 10, 1919."

Then there is set out the names of the attorneys who appeared for the respective parties.

Then follows:

"Deposition of L. A. Shadburne for plaintiff." (119.)

Then follows the testimony of the witnesses in narrative form, to the end of the statement on page 928 of the record.

Next follows this:

"Certificate of judge to statement of evidence.

It appearing that the foregoing statement of the evidence to be included in the record on appeal to the Circuit Court of Appeals for the Ninth Circuit is full, true, complete and properly prepared, pursuant to stipulation filed herein this day, the same is hereby approved.

Dated April 22, 1921.

BLEDSOE,
Judge." (929.)

The stipulation referred to in the certificate, after the title of the court and cause, reads:

"Stipulation re statement of evidence on appeal.

It is hereby stipulated and agreed that the statement of evidence lodged by the plaintiff, United States of America, with the clerk of the above entitled court on the 18th day of August, 1920, may be approved by the court or the judge as the statement of evidence to be included in the transcript on appeal taken by said plaintiff in the above entitled and numbered cause to the United States Circuit Court of Appeals.

Dated April 4, 1921." (116-117.)

The certificate of the clerk of the District Court to the transcript of record is set out on pages 931-2, but does not identify the statement of evidence therein referred to as the statement that was lodged with him

on the 18th of August, 1920, referred to in the stipulation above mentioned.

So that it is clear that it does not affirmatively appear in this record that the statement of the evidence contains all of the evidence upon which the lower court based its decree; nor does it affirmatively appear that the statement of the evidence in this record is the statement that was lodged with the clerk on August 18, 1920, the statement which counsel for the respective parties stipulated could be used.

In Hansen v. Boyd, 161 U. S. 397, a paragraph of the syllabus correctly reflects the decision of the court, namely:

> "When all the evidence is not shown to be contained in the record it must be assumed that there was evidence in the case tending to support the theory of the case stated by the court."

In U. S. v. Copper Queen etc. Co., 185 U. S. 498, the court said:

> "It does not appear from the bill that it contains all the evidence given upon the trial. It may be that it does, but we cannot, in the absence of any statement in the bill to that effect, presume it does for the purpose of reversing the judgment herein. * * * When this court is asked to reverse a judgment * * * upon the ground that there is absolutely no evidence to sustain it * * * the bill of exceptions must embody a statement or there must be a stipulation of counsel declaring that the bill contains all the evidence given upon

> the trial, so that the record shall affirmatively show the fact. Russell v. Ely, 2 Black, 575, 580, 17 L. Ed. 258, 260. In the cited case the court, after remarking that the bill of exceptions did not purport to give all that a certain witness has testified to, said that, according to a well known rule, the court under such a condition of the record, was bound to presume that there was that in the witness's testimony which justified the instruction."

This court said in Yates v. United States, 90 Fed. 57, 62:

> "The burden of proof to show error is upon the party who asserts it and to maintain his position he must either present to the appellate court all of the evidence so that the reviewing court can see for itself what the evidence was, or present in his bill of exceptions that portion of the evidence which bears on the point in controversy, with a statement that no other evidence was submitted. As was said in U. S. v. Patrick, 73 Fed. 800, 'the plaintiffs in error have done neither.' The judgment of the Circuit Court is affirmed with costs."

There is no difference between the function of a bill of exceptions in law cases and the statement of the evidence in equity cases. Both are devised as a means of placing before the appellate court the evidence upon which the lower court based its act, so that the rule applicable to a bill of exceptions on a writ of error applies with equal force to a statement of the evidence to be used on appeal.

From the foregoing authorities it is plain that the record on appeal on its face must expressly state or show that all the evidence before the lower court is incorporated therein; otherwise the court will not declare that it does; and will not reverse the lower court on the assumption that all of the evidence on which it acted is in the record on appeal. On the contrary, the court will assume, in the absence of such affirmative showing in the record, that there was evidence before the lower court other than that set forth in the statement of the evidence incorporated in the transcript on appeal.

These rules of practice are especially pertinent here in view of the fact that there is nothing in the record to show that the statement of the evidence incorporated therein was the statement which counsel for the respective parties stipulated might be approved by the trial judge.

V.

In Conclusion.

The bill in this case was filed March 5, 1917 (19). This was at least seven years after thousands of dollars had been expended in the development of the land for oil (843). This expenditure in work was done with the full knowledge of appellant, through its Department of the Interior, as this court judicially knows through official public records of that department.

During this delay appellees, California Midway Oil Company and Associated Oil Company, "acted in the utmost good faith, both in acquiring and purchasing the locators' interests, and paying therefor, without any notice, knowledge or suspicion that there was or could be any question about the bona fides thereof. They made their contract concerning an interest that was apparently valid. No circumstances were disclosed, until after the full performance of the contract and the payment of the purchase price, which cast any suspicion upon the title." (Quotation from Judge Bean's opinion.)

These are facts which this court can properly take into consideration in determining this appeal.

In United States v. Flint, 4 Saw. 42, Mr. Justice Field said:

> "All the attendant circumstances of each case will be weighed that no wrong be done to the citizen, though the government be a suitor against him."

In U. S. v. Trinidad Coal etc. Co., 137 U. S. 160, it is said:

> "When a sovereign becomes a suitor it submits its rights to settled judicial notions of morals and good faith the same as the subject."

The "settled judicial notions of morals and good faith" referred to in the quotation last above were stated in Kirk v. Hamilton, 102 U. S. 68, 76, thus:

"There is no principle better established in this court, nor one founded on more solid consideration of equity and public utility than that which declares that if one man knowingly, though he does it passively by looking on, suffers another to purchase and expend money on the land under an erroneous opinion of title, without making known his own claim, he shall not afterward be permitted to exercise his legal right against such person. It would be an act of fraud and injustice."

And in Dickerson v. Colgrove, 100 U. S. 578, 580, it is said:

"The vital principle is that he who, by his own conduct, leads another to do that which he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood and the law abhors both.

Mr. Justice Severens in U. S. v. Chandler etc. Co., 152 Fed. 41, in reference to the rights of the United States as a litigant concerning its property interests, said:

"It (the United States) is held to be affected by those equities which are recognized as fundamental in controversies between private parties. And why should this not be so? It derogates from the dignity and character of the government to suppose that, formed as it is to secure impartial justice between individuals, it may nevertheless in the conduct of its own affairs, without regard to the

principles it represents, perpetrate upon its citizens wrongs it would promptly condemn if practiced by one of them upon another."

These facts and these authorities may be properly considered—indeed they should not be lost sight of —in testing the sufficiency of the evidence relied upon to prove fraud. These facts and these authorities amply warrant this court in holding appellant to the strictest rule of proof; in refusing nicely to weigh the testimony for the purpose of finding some ground upon which to interfere with the decree of the trial court; and in refusing to interfere with that decree upon anything less than a conclusive showing of error therein. The burden of such a showing is upon the appellant and that burden it has wholly failed to carry, as has been fully shown herein.

For all the foregoing reasons it is respectfully, earnestly, and confidently submitted that the decree appealed from should be affirmed.

GEO. E. WHITAKER,
JORDAN & BRANN,
ROBERT M. PEASE,
U. T. CLOTFELTER,
Solicitors for Appellees.

APPENDIX A.

Opinion of Honorable Robert S. Bean, Judge United States District Court.

We are hereby concerned with a suit brought by the United States to enjoin the continued operation by the defendants of the northwest quarter of Section Thirty-two (32) Township Thirty-one (31) South Range Twenty-three (23) east Mt. Diablo Meridian, in Kern County, California, as an oil bearing placer mining claim, to cancel and set aside certain mineral locations thereon and for an accounting for oil taken therefrom.

The result depends upon the bona fides of a paper location of the property in question under the placer mining laws, made in January, 1909, in the names of H. E. Bashore, R. B. Welch, W. A. Keenan, Eugene Metz, W. A. Mahr, H. M. Walker, F. H. Romaine and C. Rupert Walker by L. B. McMurtry, as their attorney in fact. McMurtry is and for many years has been extensively engaged in speculating in and disposing of alleged locations of prospective and undeveloped oil lands, part of the public domain in California.

In 1903, while in Chicago attempting to sell stock in a company organized for the development of such locations, he became acquainted with L. A. Chadbourne and C. A. Dunbar, and at his request Chadbourne and Dunbar obtained from their friends and acquaintances, four powers of attorney, each executed by eight per-

sons, known in the record as Chicago locators, authorizing him to locate in their names mineral claims in any part of the United States, and to improve, develop and make proof thereof, and to grant, bargain and sell the same. McMurtry caused these powers of attorney to be recorded in San Benito county, California, and acting under them posted notices of location in the names of his principals on numerous tracts of unoccupied possible oil properties in that county, which, however, were never developed or proved to be oil bearing.

In 1906 or 1907 development in the Midway oil fields in Kern county became active and McMurtry caused certified copies of the Chicago powers of attorney to be recorded in that county, and about January 1, 1907, posted or caused to be posted location notices in the names of the Chicago parties on sundry quarter sections of land in that district, some twenty-six in number, including the property involved in this suit. The several tracts described in the location notices so posted were merely prospective or hoped for oil lands and none of them were developed and no discovery of oil was made on any of them until after the abandonment of the locations in January, 1909. In the fall of 1908, however, McMurtry, acting as attorney in fact for the Chicago locators, made a contract with Mrs. J. M. McLeod for the development of the property in controversy, and also the northeast quarter of the same section, upon which a location notice had been posted in the name of certain of the Chicago parties, under the terms of which Mrs. McLeod was to drill for oil

in each tract, and if it proved to be oil bearing she was to have as consideration therefor one-half thereof, the remainder to belong to the locators. A short time thereafter the contract was modified by reducing the area to accrue to Mrs. McLeod to the south sixty acres of each quarter, and her interest became vested in the California Midway Oil Company who, sometime in November or December, 1908, moved lumber and other material on to the south sixty acres of the northwest quarter of the section preparatory to beginning active operations. Before it had commenced drilling, however, McMurtry discovered or was advised by his attorney that the locations in the names of the Chicago parties were defective because of a mistake in some of the names, and because the notices intended to cover the north half of section thirty-two had not, in fact, been posted on the land described therein, owing to an error as to the boundaries. He thereupon abandoned all the locations made by him in the names of the Chicago parties, and in January, 1909, posted and caused to be recorded new notices covering practically the same tracts in the names of certain residents of New York, under powers of attorney executed by them in December, 1907. These powers of attorney were obtained under the following circumstances: During the summer and fall of 1907, McMurtry had transferred his activities to New York and was engaged in selling stock in an oil company in that city. The financial panic of that year made it impossible for him to continue his operations, and in December he concluded to return to

California. Before doing so, he asked associates of his by the names of Thorn, Thickens and Powell to obtain four powers of attorney, each executed by eight qualified persons authorizing him to locate, develop and dispose of oil lands in their names if he should be able to locate any such lands open to entry, on his return to California. Thickens, Thorn and Powell thereupon approached their employees and friends, explained the matter to them, and requested the execution of such powers of attorney, assuring them that they would thereby incur no financial responsibility and there might be something in it for them. Four powers of attorney (one of which was used in making the location in suit) were thereupon executed and acknowledged, each by eight separate persons, authorizing and empowering McMurtry to locate in the names of the signers mineral claims, to develop and improve the same, and to bargain, sell and dispose thereof. These powers of attorney were delivered to McMurtry and duly recorded in Kern county, and were used by him in posting and causing to be recorded location notices on the several tracts mentioned in this suit and other property, eight names being used for each tract. In some instances, he authorized third persons to use the names of the signers to the powers of attorney in making locations for themselves.

A few days after the location in controversy in this suit, McMurtry, in the names of Bashore and others, under one of the powers of attorney referred to, agreed with the California Midway Oil Company, through its

representative J. M. McLeod, that it should proceed with the development of the property covered thereby and the northeast quarter of the section, located by him in the names of another group of the New York parties, on substantially the same terms as the previous contract with Mrs. McLeod, as modified, but under the New York locations.

Sometime thereafter and in January, 1909, the California Midway Oil Company commenced drilling for oil on the south sixty acres of the northwest quarter and continued such work to a discovery in the summer of that year. On May 17, 1909, the New York locators, acting by McMurtry, their attorney in fact, conveyed their interest in the entire north half of the section to J. M. McLeod, subject to the outstanding contract under which the California Midway Oil Company was in possession and at work, and simultaneously therewith and as a part of the same transaction McLeod agreed in writing that if oil should be discovered on either of the quarters, he would immediately make application for patent therefor and upon issuance of the receiver's final receipt would, by good and sufficient deed, grant, bargain, sell and convey to the locators the north one hundred acres of each quarter.

On December 3, 1909, the New York locators by McMurtry as their attorney in fact, assigned their interest in the contract of May 17, 1909, with McLeod to Judge Claflin, his attorney, and on the following day Claflin transferred the same to McMurtry.

Early in 1910, McMurtry as attorney in fact for the New York locators sold or contracted to sell the west forty acres of the north hundred acres of the northwest quarter to the Columbus Midway Oil Company for $100,000.00, and received as payment thereon the sum of $10,000.00, and on March 22, 1911, as such attorney in fact, deeded the property to the company, taking back a mortgage to secure the payment of the balance due thereon. The Columbus Midway Oil Company subsequently made default in the payment of the balance of the purchase price, and on November 22, 1912, conveyed the property to McMurtry individually in satisfaction thereof, and the record now so stands.

In June, 1910, overtures were made by a representative of McMurtry to the Associated Oil Company to sell to it the locators' interest in the remaining sixty acres in the northwest quarter, the north hundred acres in the northeast quarter of section thirty-two, and 1280 acres in various other tracts covered by paper locations made by him in the name of the New York parties. Considerable negotiation and correspondence were had concerning the matter, it being agreed at one time that if the sale was consummated holders of the title would each execute declarations of trust to the effect that the title was held in trust for the original locators as evidence that they were in fact the owners of the property. This plan, however, was abandoned, and on August 4, 1910, a written contract was entered into between the New York locators, acting by McMurtry as their attorney in fact, and W. F. Herrin and others,

known as the Herrin grantees, acting for the Associated Oil Company which agreement, after stating that sixteen named persons (each of whom had executed a power of attorney to McMurtry) represented that on January 1, 1909, they had legally located the northwest quarter and the northeast quarter of section Thirty-two, Township Thirty-one (31) South, Range Twenty-three (23) East, Mt. Diablo Meridian, under the mining laws of the United States; that they were still the owners thereof, subject to the deed to and agreement with McLeod, of May 17, 1909; that a discovery of oil had been made on the northwest quarter in May, 1909, and that ever since that time they, either by themselves or their agent or representative, had diligently and continuously operated the property to the end that discovery of oil should be made upon each and both of the quarter sections; that the Thirty-two Oil Company and McMurtry individually had an apparent interest in the property; that McMurtry is the duly authorized, empowered and acting attorney in fact for each, and all of the sixteen named persons with a right to sell their interest in the property and make conveyance thereof. The contract then provides that in consideration of five thousand dollars paid to McMurtry by the Herrin grantees, he would place in escrow deeds executed by himself as attorney in fact for each and all of the locators, conveying to the Herrin grantees all his interest in the north one hundred acres of the northeast quarter, and the north one hundred acres of the northwest quarter, except the west forty acres of

the latter tract, and also deeds from McLeod, the Thirty-two Oil Company and himself individually conveying to said grantees their interest, if any, in the property; that he would proceed forthwith to obtain from the various locators, in proper form to be recorded pursuant to the laws of California, an acknowledgment that at the date of such agreement his power of attorney was in full force and effect, and also a ratification and confirmation by each and all of such persons of the execution of such deeds. The purchase price of the one-hundred-and-sixty acres in the north half of section thirty-two was to be the sum of $430,000.00, $175,000.00 of which was to be paid in cash, and the balance with interest in production. It was agreed that immediately on the deeds referred to being placed in escrow by McMurtry, the Oil Company would deposit with the Bank of California $85,000.00, which should remain in escrow until the ratification and confirmation provided for should be obtained from the locators, when it and the $5000.00 previously paid to McMurtry should be applied on the purchase price of the property. The remaining $85,000.00 with interest was to be paid within six months thereafter, and in case the ratifications were not obtained, the $5000.00 should be returned, and the $85,000.00 deposited with the bank withdrawn by the Oil Company. The balance of $255,000 was to be paid from production at the rate of twenty cents per barrel. The contract also recites that the Associated Oil Company, as the agent of the Herrin grantees, had made and entered into con-

tracts with McMurtry as attorney in fact for the purchase of other tracts of land located by him in the name of the New York locators, aggregating 1280 acres, at an agreed price of $1593.75 per acre, payable from the oil produced from such property, and it was agreed that the Oil Company would immediately upon being let into the possession of the 160-acre tract in section thirty-two start at least one string of tools for the purpose of obtaining oil and would continuously operate the same, barring accidents and delays, until at least one well should have been drilled upon each ten acres thereof, providing it should be proven to be oil bearing in paying quantities. That immediately on being let into possession of each of the other 160-acre tracts, it would start at least one string of tools thereon and continuously operate the same, barring accidents and delays, until it was determined whether it was oil bearing or not, and that production from each tract should be applied to the purchase price thereof at the rate of twenty cents per barrel. But in case the grantees should be dispossessed by the United States or other claimants of any of the property, it should not be responsible for the unpaid purchase price of such property or for damages on account thereof.

The deposits in escrow were made by the respective parties as provided in the contract, and the attorney for the proposed purchaser prepared a form of ratification to be executed and acknowledged by the several locators as follows: "I, the undersigned, do hereby acknowledge that that certain power of attorney of

date ——— day of December, 1907, and recorded in book 10, of Powers of Attorney at page 13, Records of Kern County, State of California, by me together with seven others executed to L. B. McMurtry, is and at all times since said date had been in full force and effect and has never been revoked or modified, and I do hereby ratify, approve and confirm that certain contract of sale made for me and in my name by L. B. McMurtry as my said attorney in fact, with W. F. Herrin, et al., of date the 4th day of August, 1910, and all contracts, agreements, deeds and conveyances made by said attorney for me and in my name, and concerning said contracts of sale and sale, and also all other contracts and transactions and acts made or done under said power of attorney by said McMurtry. Witness my hand and seal this ——— day of ———— 1910".

McMurtry thereupon went to New York and in due time obtained from all the thirty-two persons who had previously given him powers of attorney (except one who was dead) the execution and acknowledgment of the above ratification, the several blanks therein being filled in.

It was represented to them at the time the ratifications were requested that McMurtry had made locations in their names under the powers of attorney given him, and had sold or contracted to sell part of the land so located in order to obtain money with which to develop the remainder, and that their share of the proceeds of such sale was the sum of $250.00, which was paid to each of the locators, either at the time of the

signing of the ratification or subsequently thereto, by a check signed by one Searls, but which was cashed by him upon being endorsed by the payee thereof. Upon the back of each check and immediately above the endorsement of the payee was the following: "Received from L. B. McMurtry $250.00 in full payment for all my right, title and interest in and to the lands located by said L. B. McMurtry on my behalf in Kern County, California, pursuant to a power of attorney made by myself and others to said L. B. McMurtry, bearing date the 19th day of December, 1907."

Thereafter and in 1910, the ratifications were delivered to the Associated Oil Company, the deeds previously deposited in escrow by McMurtry withdrawn by it, the money deposited by the Oil Company paid over to McMurtry, and the sale consummated. The Oil Company immediately went into possession of the property and has ever since occupied, improved and developed the same at a very great expense.

On August 17, 1911, McMurtry caused to be organized a corporation known as the Pacific Oil Lands Company, with a capital of one million shares of the par value of one dollar each, and himself subscribed for all of the stock except three shares. On September 1, 1911, acting as attorney in fact for the New York locators, he transferred to such corporation their interest in the contract of August 4, 1910, with the Associated Oil Company, and a contract with McLeod covering another section. Prior to such transfer there had been paid to McMurtry by the Oil Company on its con-

tract $172,000.00. After the transfer of the contracts to the Pacific Oil Lands Company, the Associated Oil Company continued to deal with such corporation and to make payment to it on such contracts (and a subsequent modification thereof of date August 1, 1913, by which the company bound itself to pay $1,375,000.00 for the property, $75,000.00 in cash, and the balance in payments of $201,000.00 a month) until the full consideration for the property of more than $1,500,000.00 had been paid, the last payment of $812,353.18 being made February 15, 1916, more than a year before this suit was commenced.

In 1911, before the modification of the contract, applications had been made to the local land office for patents to six or eight tracts located by McMurtry in the name of the New York locators under his power of attorney, but not included in the contract with the Oil Company. Early in 1912, final certificates were issued on these applications and in one or more instances, the claims passed to patent.

These facts were known to the Associated Oil Company before it completed payment of the purchase price for the lands now in controversy and was to some extent relied upon by it in agreeing to a modification of the original contract in August, 1913, and in making subsequent payments of the purchase price.

A few days after the organization of the Pacific Oil Lands Company and on September 5, 1911, McMurtry cancelled or caused to be cancelled his subscription to the capital stock of the company or a part thereof, and

to be issued in lieu thereof certificates for 500,000 shares to E. A. Hoeppner, 140,000 shares to W. R. Harrison, 130,000 shares to E. W. Kay, 90,000 shares to Fred D. Hughes, and one thousand shares to each of the thirty-two New York locators. The certificates of stock in favor of the locators were delivered to them some time about September, 1911, by McMurtry or his agent, it being explained to them at that time that McMurtry had caused the organization of the Pacific Oil Lands Company for the purpose of handling the property located by him under the power of attorney, for their protection and that such shares represented their interest therein. They were advised at the time to hold the stock as it would prove valuable. In August, 1913, the several locators, with one or two exceptions, at the request of the secretary of the Pacific Oil Lands Company, gave to McMurtry a proxy authorizing him to represent them and vote their stock at a meeting of the stockholders of the corporation to be held in San Francisco. In December, 1913, they were advised by letter from the secretary of the Pacific Oil Lands Company that the corporation had $20,000.00 in cash which it wished to distribute among its stockholders as a dividend, but under the laws of California, the directors could not do so without the consent of the stockholders, and enclosing a written consent to such distribution with the request that it be signed and returned, which was done accordingly.

In January, 1914, they received from the secretary of the Oil Lands Company a check for $20.00 enclosed

in a letter saying that it represented their dividend as declared by the directors in pursuance of their written consent, and there was also enclosed in such letter what purported to be a copy of the first report to the stockholders of the company. In this report it stated in substance that for a number of years prior to January, 1909, McMurtry and his associates had located and relocated some 2880 acres of supposedly oil bearing government land in the Midway field of Kern County, California. That because of lack of funds to prosecute development work on the lands McMurtry was obliged to transfer to third persons one-half or 1440 acres thereof. That at great personal sacrifice and effort on the part of McMurtry the remainder of the lands had been held and the work done necessary to preserve the possessory title up to the early part of 1910. That the situation then became desperate. McMurtry was unable to borrow money and found himself without funds to do any more work and without means of raising the money. Just at this time he fortunately made an arrangement with the Associated Oil Company by which it agreed to take over the 1440 acres and do all work necessary to preserve the title and to pay therefore out of the oil produced from the lands, if any, at twenty cents per barrel. That the company, however, had the right to abandon any part of the land at any time and turn it back. That there were also many other onerous conditions in the agreement which it was not necessary to detail, but was the best that could be made at the time, and was the only thing

to do to save the property. That there were many people whom McMurtry felt should be beneficiaries of this agreement, the locators, the people who had given money to aid in carrying on the work of holding the lands until they were sold; those who had worked and watched, night and day, to see that hostile parties should not jump the lands; those who had labored on the land doing assessment work, and finally Mr. McMurtry himself and Mr. Hoeppner, the first of whom had conceived and carried out the plan of getting and holding the land, and the latter had done yeoman work in keeping off the trespassers and jumpers. In order that all these people should share in the contract with the Associated Oil Company, the Pacific Oil Lands Company was formed. Its stock was divided among the various people above named and provisions made to reimburse such as were given no stock. To this company Mr. McMurtry transferred the contract with the Associated Oil Company covering the 1440 acres of land in Kern County and 640 acres in San Benito County, and the stock of the company had gone to those who had contributed in any way to securing and holding the lands. That in the performance of the contract various difficulties presented themselves, and finally in August, 1913, a new agreement was entered into between the Oil Lands Company and the Associated Company by which the latter agreed to pay for the 1440 acres $1,375,000.00, $75,000.00 in hand and the balance in monthly installments of $20,000.00. That this contract for the first time gave the Oil Lands

Company the assurance of the receipt of a definite sum for the property and left only one contingency on which future payments could be defeated, and that was if the government should take possession of the land sold, the payment under the contract would cease and there would be no further obligation on the part of the purchaser. That up to this time no title to any of the land sold had been obtained from the government, the Associated Oil Company simply holding possession, but it was believed that everything had been done to entitle it to a patent. However, there is always the danger of the government refusing to grant patents, in which event all our rights under the contract will cease. That the annual meeting of the stockholders was held on November 17, 1913, (same having been adjourned from August 18th) at which time McMurtry, Hoeppner and Harrison were elected directors, and the president of the company presented a report showing receipts and disbursements from the date of the organization to August 1, 1913, as follows:

Cash received by company from production of oil under agreement with Associated Oil Company		$165,246.00
Disbursements:		
Commissions	$16,524.60	
Liquidation of outstanding and assumed obligations	92,665.41	
Paid to locators direct and attendant expenses of securing ratification of powers of attorney, etc.	9,991.30	

Salaries, managers, secretaries, etc.	38,166.60
Incorporation Pacific Oil Lands Co.	300.00
Field, office and operating expenses	3,680.50
Cash on hand July 31, 1913	3,917.59

The agreement with the Associated Oil Company of August, 1913, calling for payment to the Pacific Oil Lands Company of $1,375,000 constitutes the main asset of the company. As against this there are the outstanding obligations assumed at the time of the incorporation of approximately $150,000.00.

Thereafter and in the spring of 1914 a representative of McMurtry called upon the several locators and stated to them that the government was attempting or threatening to regain possession of the lands involved in this contract with the Associated Oil Company. That it was necessary to concentrate all of the stock of the Pacific Oil Lands Company in McMurtry so that he could better defend the government's action. That under the circumstances the stock was of but little if any value, but that McMurtry would pay each of them $250.00 for their stock if they cared to take it, and if not they could keep their stock and take chances on the outcome. In view of these statements each of the locators transferred his stock in blank to a representative of McMurtry and accepted the $250.00. This sum, together with the $250.00 previously paid and the

$20.00 dividend, is all the locators ever received on account of the locations made in their names by McMurtry, and no accounting of the money received by McMurtry or the Pacific Oil Lands Company for the sale of any of the property located in their names has ever been made to them by McMurtry or any one else, other than the report to the stockholders heretofore mentioned.

BEAN, District Judge, sitting by special assignment, after making the foregoing statement.

The record is exceedingly voluminous consisting of many thousand pages of testimony and many exhibits. There is, however, but little if any substantial dispute as to the controlling facts but the parties differ widely as to the inferences and conclusions to be drawn therefrom.

The locations made by McMurtry under the Chicago powers of attorney and the evidence in relation thereto, may, I take it, be laid aside, except insofar as it may have a bearing, if any, upon McMurtry's intention in asking for and obtaining the New York powers of attorney and making locations thereunder. None of the defendants claim under the Chicago locations, nor did the New York locators at the time the powers of attorney were executed by them and the locations made in their names have any notice or knowledge of the Chicago powers of attorney or McMurtry's actions thereunder, nor did they obtain such information until long after the sale of their interests, if any, had been com-

pleted and final payment made. The Chicago locations were mere paper locations and whatever rights, if any, were acquired thereby lapsed or were abandoned before discovery. The property thereby became open to relocation by any qualified person or persons. (Miller v. Chrisman, *73 Pac. 1083;* Bogwardt v. McKittrick Oil Co., *130 Pac. 417.*) Nor did the fact that McMurtry authorized the use of the names of New York parties by others invalidate the particular location in question if it was in fact made in good faith.

It is also clear that the defendant California Midway Oil Company and the Associated Oil Company acted in the utmost good faith both in acquiring and purchasing the locators' interests and paying therefor, without any notice, knowledge or suspicion that there was or could be any question about the bona fides thereof. They made their contracts concerning an interest which was apparently valid. No circumstances were disclosed until after the full performance of the contract and the payment of the purchase price which cast any suspicion upon the title. They were not bound to presume that their vendors were wrongdoers and therefore make a searching inquiry as to the validity of their claim to the claim to the property but could rightfully deal with it on the assumption that their apparent right was acquired and held in good faith. (U. S. v. Detroit Lumber Co., 200 U. S. 321.) And while this would not be a defense to the suit if the location was in fact fraudulent, because they were dealing with an equity, it is a

circumstance not to be lost sight of in the consideration of the case.

We proceed therefore to a consideration of the good faith of the New York powers of attorney, the locations made thereunder, and the subsequent action and conduct of the parties in reference thereto.

The signatures to the powers of attorney were obtained principally by C. W. Thorn, Edwin L. Powell and J. B. Thickens at the request of McMurtry.

Thorn testifies that during the years 1906 and 1907, he was secretary of the Empire Oil & Development Company, a corporation of which McMurtry was president, and the stock of which he was engaged in selling or attempting to sell; that he had charge of the books of the company and that its assets consisted of a lease or option on oil lands or prospective oil lands in California, which were owned or claimed by the Midway Oregon Oil Company; that he executed a power of attorney in December, 1907, authorizing McMurtry to locate oil lands in his name.

That he knew David W. Darling and asked him to sign the power of attorney. Darling had previously talked with McMurtry about the matter so that all witness had to do was to read the writing to him. There was no discussion that he remembers.

He also asked J. W. Pentz to execute the power of attorney and explained to him the reason for wanting him to do so, and that a man could locate twenty acres, or as many of them as he wished, and that he would have to do the assessment work and make discovery on

each twenty acres; that an association of eight persons could locate a quarter-section and do the assessment work and make one discovery on the quarter, which would entitle him to a patent. Witness told Pentz that he had known McMurtry a long time and believed him to be a man who understood the oil situation; that he had every confidence he (McMurtry) would locate to the best of their interest such property as was open to location.

Thorn further testifies: I think I presented the paper to Freeman for his signature, but McMurtry had talked to him about the matter before so I knew he understood the situation. McMurtry had explained to him in my presence the possibility of discovering oil on government land and what was necessary to do to locate land. I did not hear McMurtry tell Freeman or any one else why he wanted to act as attorney in fact for these people. There had been several conversations regarding McMurtry going back to California, and we wanted him to locate some land for us. The affairs of the Empire Land & Development Company were in bad shape, and there was not very much prospect of accomplishing anything. Mr. Thickens was present several times when we were talking over the matter with McMurtry, and McMurtry asked Thickens and Searls and myself if we could secure our friends to sign the powers of attorney, and I told him yes. All I remember about it is he had made up his mind to go west, and he had some blanks and if we could get some of our friends to sign them, he would make locations

for us. McMurtry gave me the form of the power of attorney. McMurtry offered to locate land for us and we accepted his offer. He was going to California, and we had every confidence in his ability to do the work and we did not consider anybody else. He said he was going to California and wanted to be home by Christmas, and if there was any oil lands open to entry it would be the first of the year.

I asked Banks, Richmond, Fardner and my brother to sign the power of attorney and told them McMurtry was going west and he had offered to make some locations, and asked them if they would like to be locators, and explained to them the placer mining laws and had them read the power of attorney. I think Freeman asked Chapman to sign the power of attorney. I took him to the notary. After Freeman left us, Chapman said that Freeman led him to believe that there would be millions in the result of his becoming a locator, and I told him I did not know whether there would be millions in it or not, but there might be something, it all depended on whether there was oil discovered on the property.

I also had a conversation with Manicke, one of the signers, and asked him if he understood the placer mining laws. He said he did not, so I explained them to him and had him read the power of attorney. I explained the placer mining laws to each and every one I secured and had him read the power of attorney, with the exception perhaps of Mr. Richmond who understood the mining laws himself.

I remember that before McMurtry went west in 1907, I heard him talk about the Chicago locations, or recall that subject was mentioned but not the conversation. I did not see McMurtry in 1908 and do not remember that I had any correspondence with him; may have made an inquiry of him as to what he had done under the powers of attorney but do not remember. I think we received word from McMurtry that locations had been made in San Benito County. Do not recall their number, but it seems to me there were something like ten thousand acres. The first time I learned that McMurtry had located lands in Kern County under the powers of attorney was in 1910, I think in August. I did not know prior to that time that McMurtry intended to make locations in Kern County. In August, 1910, McMurtry told me that he had made locations in Kern County, and told me that in order to make discovery he had sold part of the land, with the understanding that the purchaser would do the development work and secure patents, in order to protect the balance of the property. That he had also made contract with Herrin and others, which he explained was the Associated Oil Company, for 2,200,000, to be paid out of the production at the rate of twenty cents per barrel. There may have been other conversation but I do not recall it now. I do not know that I can remember all the sections that McMurtry mentioned, but I think 32, 34, 36 and 28 were among them. I think he told me the number of locations he had made, but I do not remember now. I was never told by Mc-

Murtry or any one else that my name was wanted to enable McMurtry to locate land for his own use or for any person other than myself.

Edwin L. Powell testified: I first became acquainted with McMurtry sometime during 1906 in New York. He was engaged in the oil business at that time. I sold him some typewriting machines and received stock in the Empire Oil & Development Company, a corporation which he represented, in payment therefore. I made frequent visits to the office of the company and finally took an interest in the proposition, and gave up my position with the Underwood Typewriting Company to go in with McMurtry to work for him, to attempt to help finance the company by selling its stock. Never had been engaged in the mining business prior to the time I commenced working for McMurtry. Mr. C. W. Thorn and F. H. Searls were employed in the office.

I executed power of attorney authorizing McMurtry to locate oil lands in my name, in the office of the Empire Oil & Development Company, at the request of McMurtry. The matter had been discussed a number of times and McMurtry had often mentioned the possibility of locating oil lands in California. He explained to me quite fully the procedure and suggested that he obtain powers of attorney from a number of interested parties, myself included, and asked me to secure powers from the others, so that when he returned to California, if there was land available for location he would be in position to locate it.

The attempt to finance the Empire Oil & Development Company proved a failure on account of the panic in 1907. It had reached the end of its rope and could not proceed further. The purpose of the company was to obtain and develop oil lands in California. I knew in a general way the resources of the company at the time McMurtry spoke to me about the powers of attorney but am not able to say just what they were, but know that they were rather small. It claimed an option on some properties and leases on others. I believe Mr. Thorn, Freeman, Searls, Harder and myself were interested in the company with McMurtry.

McMurtry left New York on the 20th of December, 1907. I signed the power of attorney just a few days before he left. I asked Taylor and Manicke to sign. I had talked more or less with Manicke about oil matters and explained the situation to him at considerable length as to the possibility of there being oil lands in California which could be located, and I represented to him if he signed the power of attorney and gave McMurtry authority to locate lands in his name that it might be to his financial advantage. Mr. Taylor was a very intimate friend of mine; had lived for a number of years in my home. I told him substantially the same as I told Manicke. I understood something about the mining laws at that time, and know that one man could locate twenty acres in one parcel, and an association of greater than eight could locate one hundred and sixty.

After McMurtry left New York in December, 1907, I made inquiries from the others in the office as to

whether any information had been received from him, and had probably half a dozen letters from him during that time. We got no definite information however. Simply knew that McMurtry had arrived in California and was busy trying to locate lands but had no definite information during 1908, simply that progress was being made and that McMurtry had located lands under our power of attorney for us. He did not advise me definitely what locations were made, either the number of them or just where they were located, but simply that the lands were in the Midway field and also in San Benito County.

I did not suggest to Taylor or Manicke or any one else that their names were wanted so that McMurtry could locate lands in their names for his own use and benefit, or request them to permit the use of their names so that McMurtry could do so. There was no suggestion to that effect either by me to the signers of the powers of attorney nor by McMurtry to me. I never requested nor suggested to Manicke or Taylor that they execute any instrument declaring that McMurtry or any person other than themselves were to be interested in any way in the lands that might be located by McMurtry under the powers of attorney, or never asked them to sign any declaration of trust in reference to such lands, and I was never asked to do so or to obtain such a declaration by Searls, or McMurtry or any other person.

JOHN B. THICKENS testified: Have never engaged in mining or the production of oil actively. Lived in New York in December, 1907. In the woolen business, firm name Nixon & Thickens. Knew L. B. McMurtry. Became acquainted with him in 1905. Met him at his office, 299 Broadway. He was engaged in the oil land business at the time under the name of the Empire Oil Company. I had business relations with him in 1905, 1906 and 1907. I was connected with the Empire Oil Company from the latter part of 1905. Was assistant treasurer for about a year. Frank H. Searls was the treasurer. I had some stock in the Empire Oil Company. It was given to me at the time I was made director and assistant treasurer. Met Searls and McMurtry frequently during the year 1907. The matter of securing power of attorney from a number of people appointing McMurtry their attorney in fact to locate oil lands in California was first suggested to me I think in December, 1907. I was not at that time familiar with the affairs of the Empire Oil & Development Company and did not know what its assets consisted of. Think the matter of securing power of attorney was first talked over in McMurtry's office in December, 1907. The power of attorney was handed to me either by Searls or Thorn, or I may have got it myself at his office. The matter was talked over with McMurtry, Thorn and Searls a number of times. It was explained to me what McMurtry could do out there and what he knew about oil lands, talked over in general and that is what I explained to all the people that I afterwards

secured. McMurtry did not say anything about why it was desirable at that particular time to have the power executed. Think I asked Metz, Herbert Walker, Bashore, Welch, Romaine, Keenan, C. Rupert Walker, Pratt, J. C. Thickens, Bailey, Hamlin E. Hatch, Mark W. Hatch, Wilson, Farrell, Chrisman. Bailey was an uncle of mine. J. C. Thickens was my father; both are now dead. R. B. Welch is my brother in law. I signed Chrisman's name to the power of attorney. He was not in New York at the time and did not appear before the notary. I presented the power of attorney to these several parties and explained to them the whole position as I understood it, that there was a chance for them to locate some lands in California, that McMurtry was an expert oil man and understood all about oil lands and that there was a chance for them to locate lands and possibly make some money out of it. McMurtry left New York in the latter part of December, 1907. The next I heard about the matter was some time in 1910. Had no communication with McMurtry that I now recall regarding these matters during the years 1908 and 1909. I really do not know why I did not sign the power of attorney except that it was filled up with other parties. In 1910, Searls said there had been locations made. I remember the ratification but did not talk personally to any of the locators about executing it, nor was I present at the time it was executed by any of them. Knew about the payment of money to the locators in 1910. The matter was handled by Searls. I remember going out to see Chrisman about the matter

and getting him to ratify the original power of attorney. I knew of the stock in the Oil Lands Company having been given to the locators but was not present when it was done. I believe McMurtry was in New York in 1911. Had no particular talk with him about the matter. Had repeated conversations with some of the parties who signed the power of attorney, about the stock transaction and they seemed very much satisfied and very well pleased. I also had talks with them about the $250.00 paid them by Searls. A great many of them worked in my office at that time and we talked about it repeatedly, and they all seemed very well pleased. Know about the delivery of the stock by the locators, or the delivery up of the stock in the Oil Lands Company; that was in 1914. Talked with some of the locators about the matter. Do not recall the conversations at this time. After the surrender of the stock nothing further occurred in regard to the matter until the fall of 1916 when a number of the locators went to California.

I had a thousand shares of stock in the Empire Oil & Development Company. Had many talks with McMurtry about oil lands and the great fortunes that had been made in California by different people in the oil fields, and the vast number of acres that were obtained from the government from mere occupancy and drilling upon the lands. Heard this from McMurtry and his associates. I received no salary as assistant treasurer of the Empire Oil & Development Company. I sold some stock for that company and in doing so talked

about the values or possibilities of speculation in stock and the California oil lands. I was advised by McMurtry and these other gentlemen that all that was necessary to do in order to obtain lands was to locate them with bona fide locators of the age of twenty-one years, and go upon the land and expend one hundred dollars a year leading up to discovery, and that such discovery would relate back to the very initiative, to the filing of the location notices, and knew that the government's price of the land was two dollars and a half an acre. The Empire Land & Development Company discontinued doing business before the powers of attorney were obtained because of the fact that there was a panic in New York and it was impossible to sell stock or get money to do the development work on the property for which it held options. Knew the financial condition of the parties signing the power of attorney, and it was good.

McMurtry never told me that he wanted me to get a lot of people to sign a power of attorney so he could control them or so he could get land for himself and I never had any interest whatever in lands located by him under the power of attorney.

I asked my father and my uncle and my brother-in-law to sign power of attorney. McMurtry told me that he was going out to California to look over this unoccupied land,—government land or lands upon which the locations had lapsed and that he wanted to be prepared to locate such lands for actual bona fide citizens of the United States. It was never understood or

agreed that I should have any interest whatever in the located lands nor was it understood that McMurtry was to be a part owner of any such lands he might locate under the power of attorney. McMurty did not say that he wanted people to sign the power of attorney that I could make do as I pleased, or that I could influence at any time to give up any part of their interest in the locations, or persons that would stand in with him or permit him or any one he selected or designated to get more lands under the laws of the United States than the law permitted. I was paid no money nor was I promised any by McMurtry for obtaining signatures to the power of attorney, nor was I promised any interest in the located lands for so doing. McMurtry told me before the powers of attorney were executed that if he located lands in California under the powers of attorney, he would endeavor to locate good lands, and that the parties for whom the locations would be made might make a good deal of money out of them, and that is the reason I got my father and brother-in-law to sign the papers, and put Chrisman's name thereto myself—I felt that it was a good chance for them to make some money. Chrisman was so far away I could not reach him quick enough, and signed his name to the paper because I thought he could make some money out of it. Chrisman signed the ratification. I explained the circumstances to him and he made no objection. Never asked anybody to sign the power of attorney as a favor to me, or to McMurtry, or to the Empire Oil & Development Company. The parties employed by my firm

who had signed the power of attorney frequently inquired of me if anything had been heard from California about the locations prior to the signing of the ratifications.

At the time McMurtry was in New York in 1910, he told me that he had located some lands in California for the locators and the people to whom he was contracted to sell a part thereof demanded a ratification from the signers of the powers of attorney. McMurtry did not ask me to get the signature of any specific person or persons to the powers of attorney.

Substantially all the parties who executed the New York powers of attorney have testified in the case. There is but little if any conflict in their evidence. As an illustration thereof, the substance of that given by the eight persons whose names were used in locating the particular tract involved in this suit will be stated.

William A. Mahr says: I lived in New York in December, 1907, was employed as a salesman by the firm of Nixon & Thickens, who were wholesale dealers in woolens.

I had met McMurtry at our office, had no business relations with him. He was introduced to me by Thickens. Up to December, 1907, had never been interested in any company prospecting for mineral ore or oil lands. Was not familiar with the public land laws except in a general way. Signed and executed power of attorney in the presence of Thickens and at his request. He asked me to sign it "giving McMurtry

power to locate oil lands for me—oil lands in California. We had been talking about that for some time before I signed the power of attorney, cannot remember how many days or weeks, however. Signed it in Thickens' office. Do not remember whether I read it or not. Had no talk with McMurtry about the matter. Did not know C. W. Thorn at that time. Know Herbert M. Walker, R. B. Welch and F. H. Romaine, W. A. Keenan and C. Rupert Walker and H. E. Bashore. They were all employed by the same firm and I think signed the power of attorney before I did.

Did not hear anything about what had been done under the power in 1908, or until McMurtry came to our office in August, 1910. I had a conversation then with him about the matter. He said he wanted to get my ratification of the power of attorney. He said it was necessary for him to dispose of part of the lands in order to carry on work on the balance, and in order to do that he would have to get my ratification to show that I was still alive, and that I was a real live locator, as he put it, and that he was still my agent. I would not sign the ratification at first and Mr. Nixon advised us to consult an attorney to see that it was all right, and after doing so, at the suggestion of the attorney, the word "lawful" was inserted and I signed it. I read the ratification before signing it and observed the reference therein to the contract made by McMurtry as my attorney in fact with Herrin and others, of date August 4, 1910, but received no information from McMurtry or any other person as to the contents of the pro-

posed contract other than as disclosed by the ratification. Made no inquiry of McMurtry about the matter.

Did not know how many tracts of land had been located by him under the power of attorney and did not make any inquiry about it nor about the state of development of the property. Received nothing of value at the time of ratification, but did receive $250.00 about a month later from Mr. Searls, who gave me a check on the Second National Bank of New York City for $250.00, signed by him. I do not know whether type-writing was on the back of the check at the time I endorsed it or not, and do not remember whether I read the writing or not. I have no recollection now about the matter. Searls said to me at the time he gave me the check, "I have got the $250.00 that McMurtry promised you, and if you will endorse that check, why, I will introduce you to the paying teller and he will give you the money." McMurtry told me at the time I signed the ratification that I would get about $250.00 out of the part of the land which had been sold. When I endorsed the check, I handed it directly to the paying teller at the bank. Thickens requested me to go up and see him. Walker, Wilson and Metz were at the bank when I endorsed the check. No explanation was made to me at the time about the writing on the back of the check. I was with Searls just long enough to get the check cashed.

McMurtry said that when the transaction was closed with the people he was going to sell a part of the land to, I would get $250.00 or thereabouts, but there was no

conversation at the time the money was paid as to the source of it.

The next I heard about the California oil lands was about a year later when McMurtry called on me and said that he had formed the Pacific Oil Lands Company in order to protect the locators' interests, and that he had one thousand shares for me. I think that was about September, 1911. Had not talked to any one about the California oil lands between the time when I received the check for $250.00 and when McMurtry gave me the shares of stock in the Oil Lands Company. I do not remember signing the receipt for the stock but never received more than one certificate of stock in the Oil Lands Company. McMurtry said at the time he gave me the stock that he had organized this company to protect all the interests of the locators and "that the stock was worth a great deal more than the face value would indicate, and that to put it away and not sell it to any one." This conversation occurred in my office and Metz, Wilson, Walker and myself were present.

I was not advised as to the number of locations which McMurtry had made under my power of attorney, nor as to the area and extent of the land that had been located or the state of its development, or of any contract made with reference thereto except the one referred to in the ratification.

I knew at the time I received the stock in the Oil Lands Company that there had been a million shares issued but did not know to whom they had been issued, except I knew the locators each got a thousand shares.

Did not know that McMurtry had any shares in the company, or that Major Hoeppner had. Made no inquiry of McMurtry with reference to the matter at the time nor as to what had been done with the contract with the Associated Oil Company of August 4, 1910. May have talked the matter over with the boys around the office.

The next I heard was in 1912 or 1913, I received a notice of a meeting of the Board of Directors of the Oil Company but no advice given me at the time concerning the lands that had been located. In the latter part of 1913, I received a notice and a proxy to sign, so that the directors could distribute a dividend which they had, and which proxy I signed and returned to them. Government's Exhibit 46 is the proxy referred to and was received by me through the mail, accompanied by a letter signed by F. E. Harrison, secretary, which I think is substantially the same as Government's Exhibit 40. After I signed the proxy I sent it out to whomever it was supposed to go in San Francisco. About a month later, I got a $20.00 dividend and a statement of the transactions of the Oil Company. The paper I signed was a consent that the directors of the Oil Lands Company might set aside $20,000.00 cash of the assets of the corporation as a dividend—to be declared as a dividend upon the stock of the corporation, and such other sums from time to time as in their discretion might be held advisable. Dividend was received by a check dated January 8, 1914. Accompanying the check was a letter and also a state-

ment (Government's Exhibit 35) entitled "Pacific Oil Lands Company's First Report to Stockholders."

In the spring of 1914, Mr. Searls called on me and said that it was necessary to get all the stock of the Oil Lands Company into one hand so that they could fight this thing successfully "as the government was trying to reclaim the lands, and in order to do this successfully it was necessary to get the stock into one hand, into the hands of Mr. McMurtry." He said he would give me $250.00 for the stock and I told him that amount was very small, inasmuch as when McMurtry gave me the stock he said it was worth a great deal more than the face and not to sell it. And Searls told me that $250.00 was all I would get, and that is all they could afford to pay for it; the whole thing did not amount to much and if I did not take that I would get nothing. I thereupon signed a transfer of the stock in blank and delivered it to Mr. Searls. After surrendering the stock to Searls, I never received anything more from the Oil Lands Company, either in money or anything of value. At that time, I knew nothing about the resources or the assets of the Oil Lands Company other than as appeared in the report which I received, nor as to what had been done under the contract of August 4, 1910, with the Associated Oil Company, except as specified in the report. Did not know how many locations had been made in my name and had no information as to the state of the development of the lands or any lands which had been located and upon which my name appeared as a locator other than as appeared in

the report. Did not make any further inquiry at that time nor until Mr. Helm came into the office in 1916. Mr. Helm came to find out if I had signed the power of attorney and the different papers, and wanted to know if I would come to San Francisco as a witness in suit of U. S. vs. Thirty-Two Oil Company then pending. I was under the impression that Mr. Helm was an agent of McMurtry and I did not feel as if I wanted to do anything for McMurtry. In looking up the reports, according to the statement he had sold the land for $1,300,000.00 and he had other money which he had received, and I figured the enormous amount that he got out of it, and that we as the clients and he as our agent, we should only get approximately $520.00. Helm asked me if the different papers which I had signed were my signatures, and I told him yes, and he asked me if I would come to San Francisco as a witness, and I told him I would let him know, and that is about all that transpired between us. He showed me photographic copy of the ratification and my signature and one or two others. I went to San Francisco but was not placed on the stand or interrogated in reference to these transactions.

I know some of the parties executed the power of attorney before I signed it, but whether the entire seven had done so or not, I do not remember. I was on the very best of terms with the other signers of the paper but had never talked the matter over with them. Nothing was said to me by McMurtry about the matter before I signed the power of attorney and Thickens did

not tell me that he was asking for the use of my name so as to take up lands for the benefit of McMurtry, nor was any suggestion or insinuation made that McMurtry was to have any interest in the lands located by him for me or any of the other signers, and nothing was said that indicated that Thickens was to have any interest in the property. I had no intention, when I executed the power of attorney, of permitting McMurtry or anybody else to use my name for the purpose of locating lands for themselves. Never had any conversation subsequent to the execution of the power of attorney with Thickens, McMurtry, Hoeppner, Harrison or Searls, or anybody else, upon the subject of McMurtry or any other person, owning an interest in any locations which were made in my name other than the contracts referred to in my testimony.

Had no intention, when I executed the power of attorney in any way to aid or assist anybody to obtain more mineral land than he was entitled to under the law, and no intention to defraud the government or the people of the United States out of any of the public domain or out of its mineral land or its minerals or any thereof, and no intention other than that Mr. McMurtry, as my attorney in fact, should legitimately and honestly locate for me and my associates as much land as he considered was oil land and could be legally and lawfully and profitably located.

Thickens said, when he asked me to sign that power of attorney, that if McMurtry located lands in my name, a report of anything of importance would be

made to me. The matter of assessment work, expenditures on the property, mortgaging or making contracts or leasing the land was left entirely to Mr. McMurtry to work out. There was no agreement that I should not put money into the property for assessment or development work. Did not know how many shares of the capital stock of the oil company had been issued when I received my certificate. McMurtry said it was a close corporation formed to protect the locators. Each locator received one thousand shares and we took it for granted that if all of us were there and got a thousand shares that was what was going to everybody else. I understood at the time that whatever interest the locators had in the property or the contracts in reference thereto either had been or would be transferred to the Oil Lands Company. McMurtry so told me or words to that effect.

I knew from the report that practically 2880 acres of supposed oil bearing land had been located, and that 1440 acres or half thereof had been transferred for the purpose of maintaining the possessory title, and that an arrangement had been made with the Associated Oil Company to take over this 1440 acres of land, and do all the work necessary to preserve the title and to pay therefor to Mr. McMurtry out of the oil produced from the land, if any, twenty cents a barrel. McMurtry said, when he went back with the ratifications, he would receive some money, and my share would be $250.00 and the balance would go to take care of the land which he still retained. I made no particular inquiry of Mc-

Murtry or Thickens or anybody else concerning the conditions in California because I trusted McMurtry as my agent, and he knew that business thoroughly, and I knew when anything of importance came up, he would notify me. Thickens told me that he would do so. I do not recall just what McMurtry said about the matter at the time he got my ratification, although he said he was going to sell part of the land, and that he would notify us as things developed.

At the time I transferred and delivered the stock to Searls, and he gave me $250.00, he told me that there was a possibility of litigation with the government and that the government might take the lands away from the Associated Oil Company, or the Pacific Oil Lands Company, and in that event the stock would not be worth anything at all, and that I could take my choice and either keep the certificate and take the chances of what would happen, or he would give me $250.00 spot cash for it, and that is all that he would give for the stock, and that I could take it or leave it. He expressed the opinion that if I did not take it I would get absolutely nothing on account of the litigation.

I do not remember that I was told at the time I endorsed the first check for $250.00 that McMurtry wanted the so-called endorsement on the back thereof in order that the locator's interest could be transferred to him individually so that he might more easily and better handle the properties for the locators, or words to that effect. Have no recollection of any explanation being made to me by anybody of the typewriting on the

back of the check, but I would not say positively that there was not. I did not understand that at the time I was selling my interest in the located lands to McMurtry and no such representation was made to me by Searls. McMurtry told me that the Pacific Oil Lands Company was organized to gather together the lands, so as to protect the locators' interests.

I knew at the time I signed the ratification in August, 1910, that McMurtry had made contracts concerning the disposition of part of the property and that the purchasers were asking that the locators ratify these contracts, and that the Oil Lands Company was subsequently organized to take care of interests in these lands and the contracts appertaining to them. I so understood from McMurtry's conversation.

The first time I met Searls was when he gave me the $250.00 at the bank, and that was the first time I saw C. W. Thorn. When I got the report of the condition of the Pacific Oil Lands Company, I read it over and thought it was a wonderful proposition, and that there was lots of money going in there, and I had known McMurtry through Thickens for a long time, had been given to understand that he was a man of wonderful character, a man of great ability and absolutely honest. I had no reason to believe that he was not acting in good faith with us, and I believed when he told me something that he was telling me the absolute truth, and therefore I did not question him at all. What was said in the report about the government and what was told me by Searls caused me to believe that

there was little chance in our succeeding in holding the land as against the government, and their statement was an intimation to me upon which I relied to take the $250.00 and save that much out of the wreck. I took it as a hint that I better accept that or I would not get anything, and that was because of the withdrawal of the lands and litigation in reference thereto. That is really what Searls told me. I would not have signed the power of attorney if I had known that McMurtry or any one acting for him intended by the use thereof to defraud the government out of any of its public lands.

I did not tell McWilliams in New York on April 23, 1914, that I had signed the power of attorney as a favor to Thickens, and that I considered the $250.00 received from McMurtry more in the nature of a gift or a pick-up, or that McMurtry had treated me royally and I was thoroughly satisfied with the outcome of the matter.

I am one of the plaintiffs in the suit of William A. Mahr, et al., against McMurtry, pending in the Superior Court. Mr. Himphreys is my attorney in this suit and I gave him the facts just as I have given them here today.

William A. Keenan testifies: Resided in New York in 1907. Salesman employed by Nixon & Thickens. Was not familiar with the laws covering the acquisition of public lands, except in a general way. Executed power of attorney to McMurtry, signed it in the office of Nixon and Thickens. Did not know McMurtry or Thorn or Searls or Harrison at that time. Think I

had seen McMurtry once. Was requested by Thickens to sign the power of attorney and never talked with him about the matter prior to that time. Thickens asked me if I was twenty-one years of age, and I told him I was, and he said "I want you to give me your power of attorney authorizing McMurtry to locate oil lands for us in California. There were three or four signatures to the paper at that time. I did not read the power of attorney and I had no talk with any person about the matter prior to my signing it, other than that I knew it was going around the office and was for McMurtry to locate oil lands in California for the people who signed it. I was afraid Thickens was going to leave me out of it, and if he had not asked me, I would have asked him to let me in on it.

The first time I heard anything further about the oil lands transactions was in 1910. In August of that year, Thickens came to see me and asked me if I recalled the power of attorney I had given to McMurtry. I told him yes, and he said there is some money coming to you. It is necessary for you to ratify that power of attorney. So he took me out to a notary who was in the same building and on the way to the notary's office I asked Thickens what had happened and he told me that McMurtry had succeeded in locating oil lands and some of it had been sold, and there was a payment of $250.00 coming to me, and there would be more payments from time to time. I signed the ratification at that time but did not receive any money. I read the ratification over but do not know that I gave it any special attention.

Did not inquire of Thickens anything about the contract of August 4, 1910, with Herrin and others mentioned in the ratification, nor was I advised by anybody as to the nature of the contract. Did not know at that time how many locations had been made by McMurtry in my name, and did not inquire of Thickens or any one else.

About a year after I signed the ratification, Mr. C. W. Thorn called to see me and introduced himself as the agent of McMurtry, and said that he was there to pay me $250.00, which was coming to me. That was about a year, I think, after I signed the ratification. After I signed the ratification and before I received my money, I called Thickens on the telephone probably half a dozen times and inquired of him what had happened. Told him that some of the locators had received their money but I had not, and Thickens explained that one of the locators had died, and I couldn't receive my money until his will had been probated. Thorn paid me $250.00. He produced a check, and said it would probably be more convenient to me if he would pay me the money, and save the inconvenience of going to the bank to cash the check—that he would cash it if I would endorse it, which I did. The writing on the back, purporting to transfer all my right, title and interest in and to all lands located by McMurtry on my behalf in Kern County, California, pursuant to power of attorney made by myself and others to McMurtry, bearing date the 19th of December, 1907, presumably was on the back of the check when I endorsed it, but I do not know whether it was there or not. I did not read it. Thorn

said he did not know what particular lands had been sold in order to raise the money, and I did not inquire of Thorn about the matter. Did not know at that time how many locations were made but knew there were some in California. Shortly after that time I got a telephone call to come to the Waldorf-Astoria Hotel, and I went to the hotel and was introduced to McMurtry by Thorn. There were other boys present and when I got there, McMurtry had some certificates of stock and he started to talking about locating oil lands and what trouble he had been to hold them, and he gave us each a certificate and said that represented our interest in the Pacific Oil Lands Company, which had been formed to take care of the original locators. That the land held by that company represented the best that had been located. The face value of the stock was a dollar a share but he said it was worth double its face value at that time, and for us to put the certificate of stock away and forget it as it was valuable, and that at any time we care to dispose of it or sell it, to get in communication with him. I accepted the certificate for one thousand shares of stock, and receipted for it. That was September 15, 1911. At the time I received the stock I did not know how many locations had been made by McMurtry nor the area or extent of the land included therein, or whether oil had been discovered thereon, and made no inquiry of McMurtry about such matters.

About a year after I received the certificate of stock, I believe it was 1912, I received a letter stating that there was to be a meeting of the Oil Lands Company

in San Francisco. At the time I accepted the stock in the Oil Lands Company, I did not know who the stockholders were or that McMurtry or Hoeppner held any stock therein. Did not inquire of McMurtry who the stockholders were. Made no inquiry about oil land matters from the time I saw McMurtry in the Waldorf-Astoria in September, 1911, to the time I received the letter in 1912. In December, 1913, I received a letter stating that the Oil Lands Company had $20,000 to distribute and enclosing a written consent to be signed by me and returned, which I did. On the 12th of August, 1913, I signed a paper giving to McMurtry a proxy to represent me at the annual meeting of the stockholders of the Oil Lands Company to be held on the 18th of August, and any other meetings which might be held up to and including the 31st of December, 1913. Early in 1914, I received a letter with a check for $20.00, and a report of the financial condition of the Oil Lands Company. After I received the first report to the stockholders of the Oil Lands Company, thought maybe it was going to turn out to be a big proposition for us. I talked it over with Mahr and Metz, and some of the others but made no further inquiry as to the condition of the company.

In the spring of 1914, I was called to the office to meet Mr. Searls. I think Metz telephoned me. Had never met Searls before. When I went in the office, Searls said that he had already had a conversation with the others and that they had decided to do what he had advised. He said the affairs of the Oil Company were

in very bad shape, that they were financially embarassed and that the government was suing to take the land back, and to protect the locators, McMurtry wanted us to turn our stock over to him, for which he would pay us $250.00. Searls said everybody else had agreed to do it on account of the condition, and he would rather see us get something out of it than nothing, so I agreed to do as the others had done. I did not have my certificate with me at the time so did not deliver it to Searls. I afterwards delivered it to Mr. Thorn, probably a day or two later, and Thorn paid me $250.00. Thorn said at the time that while McMurtry had offered to pay us $250.00 for our certificate of stock that he could ill afford to do so on account of his financial condition, and Thorn wanted me to exchange my certificate of stock in the Oil Lands Company for stock in the Columbus Midway Company; said that he was personally interested in that company and that it was a good business proposition, and he would let me consider it for a day or two and call again. He did call and I had decided not to take any stock in the Columbus Midway and accepted the $250.00 and surrendered the stock to him. The time I surrendered the stock to Thorn I did not know anything about the condition of the Oil Lands Company other than what is contained in the report to the stockholders.

At the time I had the conversation with Thickens about signing the power of attorney, he did not say to me or insinuate that he wanted me to permit my name to be used for McMurtry to locate lands for himself,

and nothing of that kind was said or intimated around the office by any of the interested parties or any one else, and never any intention on my part that it should be so used. Never my intention that the power of attorney should be used for any illegitimate purpose, or for the purpose of defrauding the government out of any of its lands. There was no suggestion or intimation of that nature from any of the parties who signed the power of attorney with me, or from any one else.

At the time of my conversation with McMurtry he said there had been a great deal of trouble with people who were trying to jump the land, and the difficulty they had in holding it against the jumpers.

Hoeppner's name was mentioned in some way but I cannot recall. I think he also told me that oil had been discovered on some of the land. He said that money had been expended in taking care of the lands, and paying the help in order to save the locators from going down into their own pockets in order to finance the project; that the corporation was organized and all these people had been or were going to be paid in stock of the corporation.

At the time I received the ratification with request to sign it, I knew that McMurtry had made a sale of some of the lands or a contract for a sale and that I was asked to confirm such contract by signing the papers. My understanding was that the Pacific Oil Lands Company was formed to take care of the original locators and that the land held by the company represented the best that had been located. The only definite informa-

tion I ever received about the acreage located was contained in the report to the stockholders. Everything else concerning the land was general talk. At the time Searls offered to buy my stock, he said that the lands were involved in litigation and the only way to protect them as I understood it, would be to turn my stock over to him so that he could make a fight for it.

Herbert M. Walker testifies: Was employed by Nixon & Thickens in December, 1907. Was not familiar with the laws of the United States concerning the disposition of the public domain; had never acquired title to any public land. Am not familiar with the public land laws. I am the Herbert M. Walker who gave a power of attorney to McMurtry to locate oil and mineral lands. I do not remember who presented the power of attorney to me for my signature. I was connected with Nixon & Thickens, and Thickens knew McMurtry, and at that time I believe McMurtry was interested in some oil company that he wanted to sell shares for, and Thickens wanted me to buy some shares of stock of that company, but I did not do so. A little later Thickens said he had a friend by the name of McMurtry who was well up on oil lands, and that he believed if we would give him a power of attorney to locate oil lands for us it would prove valuable, and therefore I signed the power of attorney. I cannot say how often he talked to me about the matter. I know he was very much interested in this other oil company and was trying to sell stock for it. I do not remember, but I think it was probably a matter men-

tioned among the boys in the office that we might hear something from it, a good thing.

The first thing I remember occurring after I signed the power of attorney was when McMurtry came to New York and wanted us to give him a ratification; I think that was probably two or three years later. McMurtry said he had located the property and that he had very little money and that in order to take and develop the property further he would have to dispose of part of it, and I was given to understand by him at the time that unless he could dispose of part of it, the locators would lose probably all of it. I therefore signed the ratification in order to try and hold what we had, but I would not sign it until after I consulted a lawyer, and he advised the insertion of the word "lawfully". McMurtry talked to me a number of times about the matter before I would sign the ratification. I do not think I asked him the number of locations that had been made by him in my name, but I was given to understand that he had located certain tracts in my name, how much property it was I cannot at this time say.

I did not make any inquiry of McMurtry about the contract of August 4, 1910, between him and Herrin and others, nor did I know what lands were affected. I took McMurtry's word that he had sold part of the lands in order to raise money to develop and hold the remainder. I was given to understand that unless we gave him the ratification, we would probably lose all the lands which he had located. I was promised

$250.00 if I signed the ratification; that would be my share of the proceeds that would come from selling part of the land, and the remainder of the proceeds would be used to develop the rest of the property.

The next thing I heard about the matter after signing the ratification was about a year later, when McMurtry came east again and gave me a thousand shares of stock in the Pacific Oil Lands Company. A short time after I signed the ratification, Thickens said to me that he had received from McMurtry the $250.00, and if we would go with him to the Second National Bank he would get the cash. I went with him and while there met Thorn and Searls. I did not know them, although I believe Thorn had been in the store before. There were four or five of us in the office and when I say "we", I refer to the employes of Nixon & Thickens, who signed power of attorney with me. When we went to the bank we met Searls and I received $250.00. Thickens introduced me to Searls, and said "This is Mr. Searls" and said "he is going to give you the money". And Searls said "All right, boys. I am going to give you the money; come right over here to the paying teller's window and endorse the check and he will give you the money for it". And as near as I remember we lined up at the paying teller's window and endorsed the check, and $250.00 was handed to each of us. I do not remember whether was any writing on the back of the check at the time I endorsed it or not. If it was, I did not see it. It occurs to me now, from an examination of the check, that it might have been there

but if it was there I did not see it. If I had seen it, I never would have endorsed the check to get $250.00, that is sure. I made no inquiry of Searls as to the source from which the $250.00 came, for the reason that I had confidence in Thickens and believed that he was working in my interest as well as the other locators, just as much as he would be for anybody's interests where they were employed by him. I did not inquire of him as to the source of the money because I took it for granted it came from McMurtry, and he said it would be my share of the proceeds therefor. I made no inquiry as to what disposition had been made of the lands upon which I had been located, of Searls and Thickens.

After I received the $250.00, I did not hear anything more about the oil transactions for about a year when McMurtry came again and gave me these shares of stock in the Oil Lands Company. That was in our office. As near as I can remember, he came in one day and said, "Here are a thousand shares of stock for you; that is part of your proceeds from the oil lands." I remember very distinctly he said under no circumstances sell or dispose of this stock, this is going to be very valuable to you. I did not inquire of McMurtry at the time he gave me the certificate of stock, nor did I hear any other person inquire of him, as to the assets and resources of the Oil Lands Company, except that when he gave me the certificate I took from what he said that it looked a great deal better for the property that we had located than it did when he came back here

to get the ratification for the reason, as he said "this would be very valuable indeed and not to sell it to anyone". That if I wanted to sell it, to let him know and he would buy it and he would give me a great deal more than was represented here. I did not inquire of McMurtry as to the number of locations, but I understood that he had located property for each one of thirty-two locators, but did not know how many acres. Did not know that McMurtry or Hoeppner had stock in the Oil Lands Company nor did not make any inquiry about the matter, nor hear any such inquiry by others. Did not make any inquiry at the time I received the certificate of stock as to what had been done under the contract with Herrin and others, and did not know.

The next thing I heard after McMurtry gave me the stock in the Oil Lands Company was a notice of the stockholders meeting in 1912, and a little later got a paper to sign appointing McMurtry my proxy to represent me at the meeting of the stockholders of the company, and subsequently I got a dividend of $20.00. The proxy was dated August 12, 1913, came to me by mail and I signed and returned it. In January, 1914, I received copy of the first report to stockholders. Sometime later, I do not remember just when, Mr. Searls came to me and said he represented McMurtry, and McMurtry had sent him to take up or buy my stock in the Pacific Oil Lands Company, and said he would give me $250.00 for it. I told him I did not care to dispose of it for the reason that when McMurtry

gave it to me, he said to hold on to it, that it would prove valuable. I told Searls I would rather have the dividends than sell the stock. Searls said that McMurtry must have the stock for the reason that the United States was going to bring suit to recover the land, and McMurtry wanted the stock so that he could better defend the suit, and having confidence in him and believing that he would do the right thing by me, I let Searls have the stock for $250.00. At the time I surrendered the stock, I did not know what the assets or resources of the Pacific Oil Lands Company were. I thought by surrendering the stock I was doing the best thing for myself, and trusted McMurtry and believed what he said, that he could better defend the suit the government was going to bring. The proposition looked reasonable and therefore I transferred the stock. I made no inquiry at that time as to the assets or resources of the company nor did I know who the stockholders were, and made no inquiry upon that subject. I thought thirty-two locations had been made, one for each of the parties. I knew nothing about the state of development except that I understood all necessary work had been done to comply with the regulations. At the time I disposed of my stock I made no inquiry about what had been done under the contract with Herrin. That subject was not considered. The only reason I gave up the stock was so that McMurtry could better defend the prospective suit. Since surrendering the stock I have received nothing on account of the land transactions, but I hope by the time

we get through with McMurtry in the suit we are bringing against him, we will get our just share.

I read the power of attorney before I signed it. Nothing was said to me about allowing my name to be used so that McMurtry could locate lands for himself or the benefit of any other person than myself. There was no agreement or understanding that McMurtry should have any interest in the land to be located, and never heard of any such arrangement. No understanding that I was to be paid money for the use of my name. I read the ratification before I signed it and submitted it to a lawyer for his inspection. The ratification was presented by McMurtry and he said that the reason he wanted it signed was because he had sold some of the property, and in order to work the balance of it he must have some money, and I believe he said something to the effect that the lawyer for the purchaser wanted to be sure that the people who had given the power of attorney were alive and would ratify the power of attorney and the contract made thereunder. I understood from what McMurtry said that not only was it necessary to sell part of the land in order to develop the remainder, but that whatever came out of the contract referred to in the ratification was problematical and would depend on whether oil was found and how much oil was found.

I had no intention at the time I signed the power of attorney or at any other time, to permit the use of my name by McMurtry or anybody else for the purpose of cheating or defrauding the government, or to

locate lands for McMurtry or any other person. No such suggestion or intimation was ever made to me, and no conversation to that effect was had with any of the signers. At the time McMurtry asked us to sign the ratification, he told us of the trouble he had had or was having in holding the property.

Eugene Metz testifies. Was working as a salesman for Nixon & Thickens in December, 1907. Prior to that time had never been interested in any company or corporation engaged in procuring or producing oil. Know McMurtry. Got acquainted with him in 1911; was introduced by Thickens. Executed a power of attorney to McMurtry on the 19th of December, 1907. Thickens came to me and asked if I would give a friend of his a power of attorney to go and locate land for me, and I asked him what it was for, and he said to try and find oil, and he said if he found oil, "you would probably make a lot of money out of it", so naturally I became interested and was willing to sign it, and did sign it. Had only one talk with Thickens about the matter. I had heard of McMurtry prior to that time but did not know him personally. He may have been in the office but I did not know him. I knew at that time that as a citizen I was entitled to some land if I could get it. Did not know how many acres constituted an oil claim, or how many persons were required to join together in order to make an association claim. Did not receive any particular advices on the matter from Thickens before I signed the power

of attorney. After I signed the power of attorney did not hear any more about the matter until 1910. At that time McMurtry came to our office and said that he had located oil lands and expected to get a lot of oil out of it; that it was such a big proposition he would have to sell part of the land in order to get money to work the balance; that it cost a lot of money to run the thing and the only way to get this money was to sell part of it and use that money. Did not ask him how many locations had been made nor as to the area or acreage thereof, and had no information on that subject. He requested me to give him a ratification of my power of attorney. About a month after I signed the ratification I received $250.00. He told me at the time that I would get $250.00; he said it would come to me from the money he received from the sale of the land. Did not know at the time anything about the contents or the purport of the contract with the Associated Oil Company and did not inquire of McMurtry about the matter, but trusted him. After I signed the ratification, I gave it to McMurtry. Mr. McMurtry came in one day and presented the ratification to me to sign, and I would not sign it right away. I said I wanted to look into it and see a lawyer before I signed it, so we took it up with a lawyer and he read it over and said it was all right only to insert the word "lawfully". By "we" I mean Mahr, Walker, Wilson and myself. I received the $250.00 from Searls at the Second National Bank. I first met Searls at the time he came into the office with McMurtry with that rati-

fication; had never met him before. Thickens told me that Searls was at the bank and if we went up there we would get our money. I think Mahr, Walker, Wilson and myself went up together. I suppose the typewriting was on the back of the check when I signed it but I do not remember seeing it. I was in the bank when Searls gave me the check and he handed it to me and says "Endorse this and I will identify you at the window". I wanted to get through in a hurry and I simply signed my name and handed it right back to him. I have no recollection of reading the typewriting on the back. Searls said at the time he gave me the check that it was the money that McMurtry had promised me a month before. I was told that it was part of the money that McMurtry got for selling part of the land located for us. I did not know at the time to whom he sold, nor did I inquire.

The next time I heard anything about the matter was about September, 1911. McMurtry came and gave Mahr, Walker, Wilson and myself a thousand shares of stock each, saying that he had formed a company to take care of the locators and that he had given me the stock as my share. I did not know what the capital stock of the oil company was at that time, nor how many locations had been made by McMurtry under the power of attorney, nor the area or extent thereof, nor the debts and resources of the oil company, nor what had been done under the contract with the Associated Oil Company which was mentioned in the ratification; made no inquiry about these matters at that

time. All I said to McMurtry was "how are things getting along" and he said all right and said he hoped to do more for us later on. He said "Put that stock certificate away in a safe and do not sell it because it is worth its face value today" and if I wanted to sell it to notify him and he would buy it back again. He was in the office probably half an hour. Made no inquiry of him as to the state of the development of the property, but he said that oil had been discovered on the land, he could not tell the quantity but it was very large. All the stockholders I knew of were the locators. Did not inquire whether McMurtry or Hoeppner held any stock or not.

The next I heard about the matter was when I got a notice of a meeting of the Board of Directors, one in 1912, and one in 1913. In 1913, I got some paper authorizing the distribution of dividends. After I signed the consent to the distribution of the dividend, I sent it to the Pacific Oil Company through the mail. The next transaction that I remember was when I got my check for the dividend in January, 1914. Received it through the mail, accompanied by the first report to the stockholders.

The next matter was in the spring of that year when Mr. Searls came and said he was sent by McMurtry to take up my stock. I think Thorn was with him at the time, I won't say for sure, but I think so. Mahr and Wilson were in the office at the time Searls said he was sent by McMurtry to buy in the stock. Everything looked bad; that the government had instituted

suits to reclaim the land, and if we did not take the $250.00 he was offering, we would get nothing; everything would be lost for all of us. We believed him and transferred our stock. He made everything look black, everything would be lost. He paid me $250.00 in cash. I made no inquiry of Searls about the property or the resources or the assets of the oil company, because he came and told us everything was down and out and there could not be any assets. I did not know how many locations had been made nor the area or extent thereof. The only information I had was in the statement I got from the company in January, 1914, made no further inquiry. Did not know what became of the contract made with the Associated Oil Company, nor at that time that they had been assigned to the Pacific Oil Company; made no inquiry about that. I thought the locators were the only stockholders of the Pacific Oil Lands Company. Did not ask whether McMurtry or Hoeppner were stockholders or not. Never received anything from the transactions after I surrendered my stock to Searls. Never expended any money in the development or improvement of the property and was never asked to.

I said I had received no advice or advices at the time I disposed of my stock that the contracts with the Associated Oil Company had been assigned to the Pacific Oil Company, but if such a statement is contained in the report to the stockholders which I received, then I knew it. I also had the information as to the number of acres located from this same report, and of the

trouble that had beset McMurtry in taking care of the lands. At the time McMurtry gave me the stock he said that the Oil Lands Company was organized for the purpose of protecting the locators and that he was paying the debts of the locators for work that had been done on the property out of the stock of the corporation and thereby saving assessments to the locators. He said he had to erect derricks which cost a lot of money and to carry water in his pockets; that somebody had to stay on the land all the time to protect it; said that the money he got from the sales was to be used in developing the balance of the land; that it was doubtful whether the locators would get any money because the purchase price of the land sold was to come out of the oil if oil was found there. If there was no oil, there would be no money.

At the time I signed the power of attorney there was nothing said to me by Thickens or anybody else to the effect that they wanted to use my name for the benefit of McMurtry, or anybody in the interest of McMurtry to enable them to get land that they were not entitled to. There was no condition of any kind or character attached to the transaction that in the event land should be located in my name by McMurtry it would redound to his benefit. I understood that if lands were located, I was to be the locator in my own right. There never was any agreement that we should be paid money for the use of our names; it just depended on whether he located land or not.

At the time Searls bought my stock he said he was authorized to offer me $250.00 for it. That there was danger of the government taking the land away and that I could either hold on to the stock and take my chances, or could accept his offer. I knew at the time I signed the ratification that McMurtry had contracted to sell part of the lands, and that the purchasers were requiring a ratification of the power of attorney so as to know if the people who had given the power were real live people and had not revoked it, and I knew the ratification was signed for the purpose of enabling McMurtry to dispose of the land, and I did so with an honest intent, and as an absolute locator, and not for anybody else. I did not intend by signing the ratification to aid or assist McMurtry in any way in cheating any third person into buying the lands illegitimately located.

Frank H. Romaine testifies: Was employed by Nixon & Thickens in December, 1907, salesman. Had never taken up or acquired title to any of the public domain of the United States under the land laws. Executed power of attorney to McMurtry at the request of Thickens. I got into this oil idea through him, who was a personal friend of McMurtry. They came to me some time before the power of attorney was signed and asked me if I would take stock in the Empire Oil & Development Company, and I took four hundred shares of stock, and from that it led into eventually the Pacific Oil Lands Company. Bought the

stock in the Empire Oil & Development Company through Thickens who represented McMurtry. Knew McMurtry very slightly. Had met him on perhaps a couple of occasions. I did not know him at the time I signed the power of attorney. Thickens explained the matter to me, and the usage in settling the California oil lands; said was no question but what the transaction was clean, above the table, and all that. Of course he was one of my employers, and naturally I thought that there could not be anything outside of what he said; besides that it was the way that lands were being located in California at that time, according to the laws of California, so I signed the power of attorney, right then, after he had explained it to me. I had several conversations with Thickens before I signed the power of attorney, so that I really understood it when I signed it better than I did before I had any explanation about it. After I signed the power of attorney in 1907, we talked about it practically right along, very little cessation in our conversation for the simple reason Mr. Thickens said on account of having invested in the Empire Company he would like to see me in it, and was almost sure I would get more out of this than I put in the other.

I afterwards learned that locations of Public oil lands had been made by McMurtry in California acting under my power of attorney. I think it was at the time we were asked for ratifications that Thickens told me, that was in 1910, I think the month of September. Prior to that time, I had made no definite inquiry as

to whether or not any locations had been made. We made inquiries about the land—some of the boys in the office made inquiry about the lands in California and what they were and whether they were productive, from a friend of ours in Chicago, a friend of the boys in the office that lived in Chicago, and who had been in California; that was about the time we signed the ratification. The ratification was presented to me for my signature by Mr. Thickens. I read it over and it was also explained to me. I read the ratification before I signed it, but did not make any inquiry about the contract of August 4th, 1910, referred to therein. Do not think Thickens said anything except in a way he reiterated what he first told me, that it was absolutely all right to sign it. I was not paid anything at the time, nor was I promised anything. In September, 1911, I was paid $250.00 by Searls; he gave me a check. I have no recollection what the typewriting was on the back of the check at the time. It was never in my possession except while my hand was on it while I signed it. Searls was not in the office more than five or ten minutes at the time. He simply said that dividend was being paid and that he brought the cash so as to save me the trouble of going to the bank. He gave me the cash, and I endorsed the check and gave it to him. Searls said the money came from the first sale of part of the lands located in Kern County. I made no inquiry of him as to the number of locations or the area or extent thereof, but I was told by Thickens, probably, what he heard from McMurtry.

That was at the time I signed the ratification. Thickens said there was practically some twenty-eight hundred and some odd acres in Kern County, and some hundreds of acres in San Benito County.

The first I heard after receiving the $250.00 was from Searls—was when I was asked to give McMurtry a proxy to vote my stock in the Pacific Oil Lands Company. Received the stock from McMurtry, Searls and Thorn at The Waldorf-Astoria Hotel. I was called to go up there, do not remember who requested me, but it was by phone. McMurtry, Searls and Thorn were there when I arrived. McMurtry handed me the certificate of stock and said to be very careful and put it in the safe—put it in some safe place because it was going to be very valuable. We did not discuss the resources of the Pacific Oil Lands Company and I did not know that the contract with Herrin and others had been transferred over to the Oil Lands Company. I did not make any further inquiry about the matter. I did not have a chance to talk to McMurtry about anything because they were in a hurry. I did not inquire as to the assets or liabilities of the Oil Lands Company, because I was told that we were going to get a statement shortly. Did not know that McMurtry or Hoeppner were stockholders in the company.

Between the time I obtained the shares of stock in 1911, and the time I executed the proxy we were constantly talking about the matter in the office. Were five or six of us who were interested in this power of

attorney. Thickens said he would like to have me execute a proxy so that McMurtry could vote my stock.

The next thing that occurred after the signing of the proxy was receipt of dividend of $20.00, and a statement of the affairs of the company. I received this by mail with a letter signed by Harrison, as secretary of the Oil Lands Company. I remember getting a "statement to the stockholders" but did not read it over carefully.

The thing that occurred next was when Searls came to New York and bought the stock from me for $250.00, I think that was in December, 1914. I cannot say definitely, it may have been in March or April. Searls came to the office where I was working and told me that the company was not in good shape and that they were either going to sell out to somebody or were going to buy the stock, and this was about what I was to get. Searls paid me $250.00, do not remember whether it was paid in cash or by check. Searls asked for my certificate of stock in the Empire Company, saying that as soon as McMurtry had straightened out some things, he was going to reimburse the holders of the Empire Oil Company for the investments which they had made. I have never received anything yet, however, on that account.

I did not know what the assets of the Oil Company were at the time I surrendered my stock to Searls and did not know anything about the contract with the Associated Oil Company except what is contained in the statement to the stockholders. Did not know who

the stockholders were or whether McMurtry or Hoeppner had any interest therein, or the number of shares held by either of them. I knew all the boys in the office that I had been in with and who were generally locators with me, in the same office. I knew what stock the boys in the office had, because we all got the same number of shares.

After I delivered the stock to Searls I never received any money from the corporation and never had any business with it.

Think McWilliams came to me in April, 1914, and asked me to give him a statement in connection with these oil land matters and I wrote him a letter, which is marked Government Exhibit 58. I know all the parties who signed the power of attorney with me except Welch, I do not recall him. At the time I signed the power of attorney, Thickens told me that McMurtry was going to California to try and find some government land that he thought would be oil land and open to location. He said that McMurtry was anxious, and so was he, to give all the persons who lost money in the Empire Company an opportunity through his efforts to locate lands in California and thereby make good their losses, if possible, and also to make some money. Thickens said that in addition to giving me a chance to make some money, I would be doing him a favor because he got a lot of people interested in the Empire Oil & Development Company who had lost their money. He did not say or intimate to me that McMurtry wanted the use of my name so as to get

lands in California for himself; he was to locate the lands for me. Nothing was said to the effect that if lands were located and turned out to be valuable, McMurtry was to have an interest therein. Never intended that McMurtry should use my name for the purpose of obtaining an interest in mineral lands or lands of the United States for himself.

At the time I signed the ratification, I was told by Thickens that a contract had been made with the Associated Oil Company, and that it was going to drill a well upon the land, and the pay was coming out of the oil at the rate of twenty cents a barrel, or some such sum, if oil were discovered on the land, and that the company demanded that there should be a ratification of the power of attorney previously given to McMurtry so as to show that the signers were real parties and were alive and that the power had not been revoked.

At the time McMurtry gave me the certificate of stock in the Oil Lands Company, he said that the company had been formed for the purpose of taking care of the locators, and that the contract he had made with the Associated Oil Company would make the property valuable. That the contract with the Associated Oil Company, which I had previously ratified, had been assigned by him for me to the Oil Lands Company and was held in that way, McMurtry told me that they had discovered oil on some of the lands.

At the time Searls came for my stock in the Oil Lands Company and paid me the $250.00 he told me that there was a sure thing of getting $250.00 if I

wanted it, and if I did not want it I could hold the stock and speculate in it myself, but that there was danger of the government suing for the recovery of the land and if they did the stock would not be worth anything.

At the time I signed the power of attorney it was explained to me that it would be a great accommodation to Thickens and also to McMurtry, and that it would be for my benefit to do it. Nothing was said about giving McMurtry an opportunity to acquire land for himself.

C. Rupert Walker testifies: Was working in December, 1907, for Nixon & Thickens, as bookkeeper. Was not familiar with the land laws of the United States regulating the disposition of the public domain and the rights of citizens with reference thereto. Had, prior to that time, never acquired any interest in public lands. I did not know McMurtry nor Searls, nor Thorn. Executed power of attorney to McMurtry in the office of Nixon & Thickens. Thickens presented it to me. Had no conversation with him about the matter prior to the time I actually signed the paper. I signed it as a favor to Mr. Thickens because he was my boss or employer and I had full confidence in him. I cannot recall just what he said about the matter except that I know I signed it as a favor to him, and the others had signed it. This was ten years ago and it is very hard to bring it back to my mind.

The next I heard of the matter was in 1910 or 1911, I received a letter from Thickens to come into the

office, that he wanted to see me. I was not employed by the firm at that time. In the letter Thickens said "I am very anxious to see you, have something of interest to tell you. Are you working in New York and could you come in to see me some day this week? Either write me or call me on the phone; it is important and know will be welcome news. Just a little money coming to you for your kindness in signing a paper for me three years ago. Will explain when I see you. Let me hear from you at once."

Between the time I signed the power of attorney and the receipt of the letter from Thickens, in August, 1910, I do not remember having any conversation or conference with any person or persons with respect to this oil land transaction except that Thickens said there would probably be some money coming to me. That was after I had signed the power of attorney. After I received the letter from him in 1910, I went up to his office, and all I can remember is I signed the ratification. No money was paid to me at the time, but Mr. Thorn came to the office in 1911 and paid me $250.00. I do not remember that the typewriting was on the back of the check at that time. I think Thorn gave me the check, but he said he brought the money in cash with him, and if I would just endorse the check he would give me the money. He said the money was from the sale of the oil lands. I did not know how many locations had been made and made no inquiry about the matter. Knew nothing about the purport of

any contract of August 4, 1910, with the Associated Oil Company, which is mentioned in the ratification.

I received certificate of stock for a thousand shares in the Oil Lands Company in 1911. It was given to me by C. W. Thorn; it was after I had received the $250.00. I do not remember of any conversation with Thorn about the matter, except that he said McMurtry was giving these thousand shares of stock to the boys. By the "boys" he meant the men in our office—in Nixon & Thickens' office. He may have said why McMurtry was giving the stock, but I do not remember. I made no inquiry about the matter. Paid nothing for the certificate. Do not know how many locations had been made, nor the extent or area of the land located, nor the resources of the Pacific Oil Lands Company.

I know some of the stockholders in the Oil Lands Company, that is the locators each got a thousand shares, but that is all. Did not know how many shares, if any, McMurtry and Hoeppner had and made no inquiry about that matter. Had never met McMurtry. I remember signing Government Exhibit 64 (proxy) on August 12, 1914. Think Thorn must have come in with it. I also received a letter from the Oil Lands Company dated August 4, 1913. Also received a notice dated August 4, 1913, of the regular meeting of the stockholders of the Oil Lands Company to be held in San Francisco, August 18th. I executed a proxy to McMurtry to vote my stock at the meeting. That was dated August 12th.

The next paper I signed was the consent to distribution of $20,000.00 in dividends. This was dated December 10, 1913. There was a letter accompanying the consent, signed by Harrison, secretary of the Oil Lands Company. Sometime after I executed this paper, I received a $20.00 dividend by check of the Pacific Oil Lands Company dated January 8, 1914. It was accompanied by a letter from the Oil Lands Company enclosing a statement of the affairs of the company. After I received the dividend check for $20.00 in 1914, and a month or two later, Thorn came to me and told me that the government was going to sue for the land, and if McMurtry had the certificates in San Francisco, it would save a lot of expense, that he wanted to see us get something out of it, so he offered me $250.00 for the stock, saying that the other boys in the office were selling, so I sold my certificate to him for $250.00, and he paid me that sum, I think in cash.

At that time I did not know how many acres of land had been located, nor the extent or area thereof, or who were the stockholders of the Pacific Oil Lands Company except that I knew the locators had received a thousand shares each. After I had delivered the stock to Thorn, I received no money on account of the land transactions. I never spent any money in the development of the property and was never asked nor requested to do so. At the time I signed the power of attorney there were four signatures thereto ahead of mine. I did not know what the paper was, but I signed it as a favor to Thickens, and they signed above mine, and I

thought the paper was all right. I do not remember whether I read it or not. There was no reason that I know, no particular reason, why Mr. Thickens should ask a favor of me rather than other people or other persons employed by him, or from other acquaintances of his. I had full confidence in him and believed that he would not ask me to sign or do anything that was wrong. I had heard of oil lands, but the only thing that I can remember was something regarding such lands in the paper I signed. While I was employed by Nixon & Thickens, I heard Thickens tell the boys in the office, or make the remark that there would probably be some money coming to us out of the transaction and I had no reason to doubt his word. The boys may have talked the matter over, but I do not remember. I do not remember hearing Thickens say anything about the locations, giving the boys in the office a chance to give McMurtry a power of attorney to have oil lands located in their names to make some money, I cannot remember. Thickens has talked to me about signing a power of attorney in his office. I did not know what was in the power of attorney. The only thing I can remember about it is that I saw McMurtry's name and something about land. That is all I can recall.

R. B. Welch testifies: Was employed by the Connecticut Company in December, 1907. Suppose I signed the power of attorney. Do not remember who requested me to sign it unless it was my brother-in-law, Mr. Thickens. Cannot recall what was said to

me by him—cannot recall whether I signed the power of attorney. I trusted my brother-in-law and signed whatever papers he asked me to sign. Do not know what purpose I had in mind in signing that. Was not familiar with the laws of the United States covering location of mining land. At the time I signed the power of attorney, I supposed I was locating a claim that some day would be worth some money. Got my information from Thickens. Do not know at this time how many claims were made under the power of attorney. I subsequently signed some ratification papers. At the time I signed the power of attorney I suppose I would have advanced some money to be used in the development of the property to be located if Mr. Thickens had said it was necessary, but he never did that I recall. I signed the ratification but cannot tell how I came to do so nor who presented it to me. I think I read it before signing it and knew what it meant, but did not make any inquiry of any one concerning the contracts between McMurtry and Herrin and the others referred to in the ratification, and had no information in reference thereto that I now recall. Did not know how many locations had been made nor where the land was supposed to be located.

I received a check from Searls for $250.00 which I endorsed and, as I now recall, sent it to Thickens, but do not recall that I received any money on account of the check. I cannot recall the next transaction with reference to the oil lands. Think I received certificate of stock in the Oil Lands Company but cannot give

you the date. I think it was received from Mr. Thorn; I think it came by mail. Cannot say how long I kept the stock. In March, 1914, endorsed the transfer thereof in blank in the presence of Horton. Cannot tell what I did with the certificate after so endorsing. Cannot say whether I received any money on account thereof. I never knew how many claims had been located. Have never claimed any interest in the lands located in my name and claim no interest now.

Am thirty-nine years old, a brother-in-law of Thickens; married his sister. In all the matters concerning the oil lands I relied absolutely on Thickens. I presume he told me the object of the power of attorney was to locate oil lands in California that might make me a lot of money. Think I got a check for $20.00. Had entirely forgotten about it until my attention was called to it during this examination. During the direct examination had entirely forgotten about the Pacific Oil Lands Company and about their having sent me this check for $20.00 dividend. Am a little nervous. There was another paper attached to the check which I signed but I cannot remember all the papers I did sign. I signed the proxy to McMurtry authorizing him to represent me at the stockholders' meeting of the Oil Lands Company, and vote my stock. I should say that I knew I had stock in the company at the time I signed that paper and should say that I also knew that McMurtry was my agent for the purpose of locating oil lands. At the time I received the check for $250.00 it was suggested to me that it might be a

good thing to buy 750 shares of stock for the $250. in the Columbus Midway Oil Company, and I may have given the check for such stock. At the time I gave up these two certificates, one of the Columbus Midway Oil Company, and the other of Pacific Oil Lands Company, I received $500.00, and I had forgotten about that when Mr. Hall asked me. I cannot tell who gave it to me. I received information of the meeting of the stockholders of the Oil Company and some paper that showed the condition of the company. When I received the $500.00 and the $20.00 I understood that it was because of my interest in the located lands out in California; I knew that I had some claim to these lands. I remember that I was informed that McMurtry had made an arrangement with the Associated Oil Company by which the Oil Company agreed to take over 1440 acres of the located lands and to do all the work necessary in order to preserve the title, and pay for them out of the proceeds of the oil produced from the land, at twenty cents a barrel, if they got oil. At the time I signed the power of attorney, Thickens told me that McMurtry knew all about oil lands in California and that he (Thickens) was getting some people to locate lands out there.. I got the impression from him that he was giving me a chance to become a locator or to have a location made in my name, and a chance to make some money out of it. I was not trying to commit a fraud on the government or any one else, or help Thickens or McMurtry to perpetrate a fraud. Did not think I was doing anything but exercising a legal right.

Thickens told me that he wanted me to sign the power of attorney for my own benefit, and did not say it was intended to give some other person a chance to locate lands. I did understand from the report to the stockholders that McMurtry had located lands, and had a lot of trouble in holding on to them against jumpers. Remember that I signed a consent authorizing the Board of Directors of the Oil Lands Company to declare a $20,000.00 dividend. Cannot remember whether I was told at the time I received the $500.00 check that there was some question raised by the government about the lands and that I could have $500.00 in cash for my interest or could hold on and take a chance on the outcome. Think I inquired of Thickens about the land and he told me that it would be taken care of by McMurtry. I have it thoroughly fixed in my mind that when Thickens asked me to sign the power of attorney he told me that it was to locate oil lands in California, and that I had a chance by doing it to make some money out of the lands. All the money I received out of the transaction was the $500.00 and the $20.00 dividend.

Harry E. Bashore testified: Lived in New York for about fifteen years. Thickens sold me some stock, a short time after which he asked me to sign a power of attorney. He was a member of the firm of Nixon & Thickens.

I considered him a confidential friend. He came to me one day and asked me to sign my name to a paper which he said was a power of attorney giving Mc-

Murtry power to locate certain oil lands in California. He said we would not be required to put up any money and by signing this paper it would mean a lot to him, as well as assist Mr. McMurtry. Under these conditions, I did not hesitate to affix my signature knowing that I would not be involved financially in any way, shape or form. I had no intention at the time of acquiring any public land for my own benefit and did not expect to locate personally or through McMurtry any public oil land with the intention of spending any money thereon in the development of the same or otherwise. I was not informed of my name having been used at any time in locating any lands.

A short time after I signed the power of attorney, Thickens came to me and asked me to sign another paper, the name of which I have forgotten, and that paper was signed in the office where I worked for Nixon & Thickens. I do not remember the exact conversation except that he wanted me to sign the paper and said that all of the other boys who had signed the power of attorney were going to sign it. I read the paper. I do not remember any specific conversation as to the contract of sale mentioned in it. In all my dealings with Mr. Thickens, he being a personal friend, I relied a good deal on what he said. I do not remember that he gave me any information as to the estimate and value of the lands affected by the power. I might have been influenced to sign it because Thickens was a very warm friend of mine, and I never felt he would ask me to do anything except what was right. And

when I signed the power of attorney, I was assured I would not be involved in any way, shape or form, and simply signed this other paper the same as the former one. I was not informed at the time that my name had been used in locating placer mines in California, and did not at that time claim any interest in such lands. I do not recall that I received any money at the time I signed the latter paper (ratification). I received some money, but as near as I can remember that came to me at a later time. I received a check for $250.00 on the Second National Bank of New York signed by Searls, but if my memory serves me right it was sent to me at a later time than when I signed the paper. Received the check from Mr. Thickens, in a letter in which he said among other things: "The use of your name is bearing fruit and I am able to make good my promise. I am enclosing a check for $250.00. Put this through your bank as soon as you can as we want to get all the checks back as soon as possible as we have to show them as receipts. In addition we are giving a bonus of a thousand shares of stock, par value one dollar per share, in the Pacific Oil Lands Company. This stock will be worth two dollars a share very soon, so you see I am making good. Just sign the two receipts and return to me. Deposit the check and get that through as quick as you can. I am glad you are on to this."

The next year I did not hear of the oil transactions, so some one or two years later Thickens wrote me again, in which he said: "Once more I have good news

for you. Send me your stock in the Pacific Oil Lands Company signed by you in the space designated on the back of the certificate. As soon as I receive this certificate will send you check for $250.00 which I have been authorized by the company to give to the locators for the return of this stock. The government is making it hot for us at the present time, and in order to carry our point with them and try to hold at least a part of our land, it is necessary to have all the stock in California. For this reason I am asking you to send me the stock properly signed by return special delivery. Upon receipt of same will forward check to you." This letter was dated March 16, 1914. I had received the stock in the Pacific Oil Lands Company at some previous time, one thousand shares. I received $250.00 for the surrender of the stock; Mr. Thickens sent it to me in the form of a check. I may at some time have received a proxy authorizing McMurtry to vote my stock, with the request that I sign it, but that is not clear in my mind. I was never informed that locations had been made in my name outside of those involved in this suit, either in Kern or Benito County, California, and I never claimed any interest therein. I think I received a check for $20.00 as dividend on the stock of the Pacific Oil Lands Company. A copy of the first report to the stockholders of the Lands Company was sent to me, I think by the company direct, in August, 1914.

Outside of the $250.00 which I received in September, 1911, at the time I signed the ratification, the

$250.00 received when I surrendered the stock and the $20.00 dividend, I have received nothing whatever on account of the lands located in my name. I do not now claim any interest whatever in such lands.

I had known Thickens four or five years before I signed the power of attorney. I invested $95.00 in the Empire Oil & Development Company, and requested Searls to return the money to me but did not get it. At the time Thickens asked me to sign the power of attorney he said that McMurtry wanted to go to California and locate oil lands, and had to have power of attorney, and showed me a line where to sign it, and that I would not be involved in any way, shape or form. I asked him whether it was right for me to sign it and whether I had a perfect right to do so, and I did not want to do anything except what was right.

I did not talk to any of the other employes of Nixon & Thickens about the power of attorney before I signed it. I do not have a recollection of doing so, although the chances are that I may have talked with them. After the power of attorney was signed, I may have talked with them jokingly about making some money out of it, but I never expected to do so. I did not know McMurtry at the time I signed the power of attorney, and never met him until I went to San Francisco some years later. I knew that Nixon & Thickens kept in very close touch with McMurtry, and I do not recall that Thickens told me at the time he requested me to sign the power of attorney that he was to be benefited thereby, or that McMurtry was to be bene-

fited or how it was going to help either one of them. At the time Thickens asked me to sign the power of attorney he said that if McMurtry made good he would take care of us. On that condition I signed the power, and was told there was sixteen others, several of whom I knew worked in the same firm, but I did not expect anything out of the transaction.

Before I signed the check for the last $250.00 I telephoned to Nixon and asked his advice and he said "when you get something for nothing what is the use of standing out". That is after I had executed the ratification and had received the report to the stockholders of the Pacific Oil Lands Company. At the time I signed the power of attorney, I had no intention to aid or assist McMurtry or Thickens to cheat or defraud the government or to permit them to use my name to cheat or defraud the government, but I acted in absolute good faith.

I was informed that McMurtry was an expert in oil lands and understood that he was going to California to see if he could find some lands and locate and commence work thereon.

J. H. McLeod, who represented his wife and the California Midway Oil Company in this transaction with McMurtry concerning the lands in question, says:

Myself and associates organized the California Midway Oil Company with a capital stock of one million dollars, and the lease or contract with Mrs. McLeod was transferred to it for 200,000 shares of its stock. It actually commenced drilling on the northwest quarter

of section 32 on January 10, 1909. I was the representative of the company and was not advised prior to January 1, 1909, that McMurtry was going to relocate the lands and did not know that the Chicago locations were defective. Made agreement for the development of the property with McMurtry, representing the New York locators, in January, 1909, and a paper was drawn up evidencing the same in Calflin's office. Mrs. McLeod and myself owned all of the issued stock in the Midway Company at that time. I had some information prior to January 1, 1909, of a supposed defect in the locations under the Chicago powers of attorney, but understood Mr. Claflin was to fix it up in some way, I did not know how.

The defendant McMurtry was called as a witness by the government and testified:

I reside in California. Interested in mining, have been for probably twenty-five years. Have operated in California, Nevada and Arizona. Think I first became interested in 1898. First interested in the Oriental Oil Company which continued in business for about a year and a half; next in the Midway Oil, known later as the Midway Oil Company of Oregon. It had its main office in San Francisco; had some lands in the Midway field which it was attempting to develop.

I am the McMurtry mentioned in the Chicago powers of attorney. Do not have the originals of such papers, have been unable to find them. The form of the Chicago powers of attorney as well as that subsequently executed by the New York parties was prepared for

me by my attorney in 1902. At the time it was prepared I did not have in contemplation any particular individuals who would execute it. I think I gave it to Chadbourne and asked him to get the parties to execute it. I asked him if he could get thirty-two locators to sign the power of attorney for the purpose of locating lands in San Benito County, California. I did not, at that time, contemplate the use of the power in the Midway field. I did not have any activity or claim any land in the Midway field at that time under location. There was no conference or conversation between myself and any of the parties who executed the Chicago powers of attorney, and I was not personally acquainted with any of them, and never met any of them until 1916. The first thing I did under the power of attorney was to make some locations or post notices of location on land in the San Benito field, I do not remember how many locations I made. I think I first used it in making locations in Kern County in the Midway field in 1907. Posted notices of location on sections 20, 22, 26, 32 and 34 in 31-23; section 4 and the northeast quarter of section 9 in 32-23. I was interested at that time in the Empire Oil & Development Company and think about half the locations made in San Benito County under the Chicago powers of attorney were transferred to the Empire Oil & Development Company, of which I was the president and manager, but that company did not claim any interest in the locations made under such power of attorney in the Midway field in January, 1907.

No one that I knew of looked after the Chicago locations made in 1907 during that year. I was not on the land at any time during the year after the locations. I was there during the year 1908. I was there quite frequently after September, having the lands resurveyed, getting the proper locations. The prior surveys had been wrong, and we spent two or three months resurveying and locating lines and corners. Hoeppner, Harrison and Kay were assisting me in the matter. Do not remember that there was any particular arrangement with Harrison or Kay as to what they were to be paid if anything. Hoeppner had been of a great deal of assistance to me, in fact without him I never could have made the locations. I promised him he should have half of whatever I made out of the property, but there was nothing specific said about the Chicago locations; it was whatever we got out of the property irrespective of the locations or how the property was secured.

During the year 1908, did not call on the Chicago locators for any money for development or work upon the property. Hoeppner advanced whatever was necessary for expenses.

During the latter part of 1908, I learned, after consulting with Judge Claflin, my attorney, that the Chicago locations were defective because of an error in the names. I was negotiating a sale of the northeast quarter of section 9 to the Chanslor-Canfield Midway Oil Company when this error was discovered. It was after I had made the contract with Mrs. McLeod for

the development of the north half of thirty-two. I told McLeod of the defects in the location and in the power of attorney, sometime before January 1, 1909, and have a dim recollection of telling him that the matter would be adjusted satisfactorily. I was not present when any of the New York parties executed the power of attorney, but they were secured at my request.

I asked Searls, Thorn, Thickens and Powell to get the names in New York for me. I do not think the matter of securing the powers of attorney was mentioned to them until the day they were delivered for the purpose of securing the signatures. We had been discussing the financial condition of the Empire Oil & Development Company, and my inability to get back to California in time to get the powers of attorney signed there. I had to use them on the 1st of January, 1908, and I therefore asked Searls, Thorn, Thickens and Powell if they could get me thirty-two locators, and they said they could without any trouble. The powers of attorney were gotten for the purpose of relocating the San Benito lands, and if it proved profitable we would make some money out of it. I intended to use them on whatever vacant lands I could find which I thought was in the oil field in San Benito County, and I did use them for making locations in that county. I was not present when any of the parties executed the power of attorney and did not know but few if any of them. Did not make any locations in 1908, under the powers of attorney except those in San Benito County. The first use of the powers of attor-

ney in the Midway District in Kern County was January 1, 1909. I had determined to relocate the lands in section 32 in the names of the New York locators prior to January 1, 1909, but did not advise the Chicago locators, or have any communication with them in reference to the matter, nor did I advise the New York locators that I intended to use their names in making the location. I first so informed them in August, 1910.

I think all the property covered by the so-called Chicago locations in 1908 was relocated on January 1, 1909, in the names of the New York locators.

Was familiar with the work on the northwest quarter of section 32 prior to January 1, 1909. It was in charge of J. M. McLeod, under contract of October 8, 1908, with his wife. Sometime between January 2nd and January 6th, 1909, made a new arrangement with McLeod for the development of the property under the New York locations, along substantially the same lines as the previous contract with his wife. Subsequently and in May, 1909, McLeod asked me to make a new arrangement, a small change, I do not remember what it was. It seems to me though it was something in regard to getting the patent. He wanted to make some different arrangement in the agreement and asked me if I would make out a new one. I consented to do so and he surrendered the agreement that was made about the first of January and we entered into the contract of May 17th.

Did not advise the New York locators at any time between January 1, 1909, and May 17th, of that nor of the arrangement that I had made for the development of the property. Think I first commenced to negotiate for the sale to the Associated Oil Company in July, 1910, which negotiations finally resulted in the contract of August 4th of that year. I received $5000.00 from the company at the time the contract was signed. The company demanded that I get ratification from the thirty-two locators, and as I did not have a great deal of money they agreed to advance $5000.00 with the understanding that if I did not secure the ratifications I was to repay it. The Associated Oil Company and its attorney demanded that each one of the locators sign and execute the ratification in the form and as prepared by the attorney of the Oil Company. I went to New York in August, 1910, taking the ratifications with me, and saw some of the locators personally, but I do not remember the number. I explained to all I got to sign the ratification the deal with the Associated Oil Company and what the ratification meant, and none of them objected to signing the ratification. Paid each one $250.00 through a check signed by Searls but with my money, which I had sent to Searls prior to leaving California for New York. The money did not come out of the contract with the Associated Oil Company but may have come from the sale of other locations which I had made in the name of the New York locators. During the time I was in New York, there was money deposited by the Asso-

ciated Oil Company in escrow in the Bank of California in pursuance to the agreement of August 4, 1910, which was subsequently paid to me.

I sold on behalf of the New York locators the west forty acres of the north hundred acres of the northwest quarter of section 32, to the Columbus Midway Company, and was to receive, I believe $120,000.00 and actually received something over $10,000. The company made default under the contract and the property was eventually conveyed to me by the company. I again visited New York in 1911, but had no communication between my visit in 1910 and that date, with any of the New York parties except Mr. Searls. In 1911, I went to New York to deliver the stock in the Pacific Oil Lands Company to the various New York locators. The Pacific Oil Lands Company was incorporated to take over the agreements between the locators and the Associated Oil Company and McLeod, and to pay for the same in stock of the company. After the assignment of the contract to the Pacific Oil Lands Company, the payments thereunder were made by the Associated Oil Company to the Pacific Company. I do not know that there was any particular reason for fixing the stock of the locators at one thousand shares, but I thought that is what they were entitled to and determined that question myself. I also determined the amount that should be paid to them in 1910 and 1911 for signing the ratification. I thought that was what they were entitled to, and I gave them the $250.00 for all their title and interest in and to the

property under the locations. After getting the first receipt or release in full from the locators, it was necessary for me to use their names again in order to make transfer to the Pacific Oil Lands Company, and to obtain a further release I delivered to them a thousand shares of stock and got a final release. At the time the shares were delivered, some or all of the locators signed a paper acknowledging the receipt thereof "in full of all claims and demands growing out of a power of attorney given by me to him (McMurtry) of date December —— 1907". At the time the stock was delivered, I advised those to whom I made the delivery to keep their stock and not let it get out of their possession.

In January, 1909, I had a contract with McLeod in reference to the development of sections 20, 22, 36 and 34, covered by the New York locations, under which he was to put a derrick and well on each quarter. I first advised McLeod that I had relocated the property in the name of the New York locators about the 3rd of January, 1909. We met in Judge Claflin's office, and I remember that we discussed the matter of making out a new agreement under the New York locations. Judge Claflin told him that the locations made in 1907 had lapsed on the 31st day of December, 1908; that the property had been relocated and we would make a new agreement under the New York locations. When I went into Claflin's office, I told him that I had relocated the property. McLeod came in shortly and the judge told him then for the first time that section 32

had been relocated and, to use a mild expression, Mr. McLeod was a little peeved at the method we had taken in relocating the property, but wanted to know what position he was going to be put in: "How am I going to protect myself? How am I going to protect the people who have invested their money in here?" The judge told him to make out a new contract or a new agreement with the new locators, that we would not continue under the locations 1907, because positively we could not make a transfer, and there was no method that he knew to remedy the defect. At the time I made the locations in the names of the New York locators on January 1, 1909, I intended to permit the previous locations to lapse, and to make a new contract with McLeod. I did not say to Chadbourne at the time I asked him to get the powers of attorney in Chicago that I wanted thirty-two people to act as locators for my benefit, or men who would transfer to me any interest which they might acquire in the property. At the time I requested Thorn, Searls, Powell and Thickens to obtain powers of attorney for me in New York, I did not suggest to either of them to get any particular persons, nor individuals whom either they or I could influence or control at any time, in any way, in the event locations were made in their names.

It was a practice prevailing in California and had been for many years prior to 1909, for persons to make paper locations of supposed oil bearing lands, and then to look about to find some one with capital who would, for an interest in the property, develop and prove the

oil bearing character thereof. The lands in the Midway field in 1908 were barren, arid, undeveloped prospective oil properties.

At the time I made the locations in 1909, the nearest well to the property, producing oil, was the Scott well on the south half or near the center line of section 31, but it was not producing in paying quantities, and the next nearest well producing oil was the Oriental, about three miles away. The territory covered by the New York locations was wildcat territory and in an absolutely experimental stage. It was and is customary in California for the same set of people to locate in possible or probable oil fields or mining districts large areas or numerous tracts of land. I was not told by the parties who secured the New York powers of attorney that the persons executing them would at any time if requested so to do convey to me or anybody else in the name all or any part of the land which I might locate under the powers of attorney, and I never received any intimation or information that the land so located should belong to me in whole or in part, and there was never any such promise or agreement or understanding. It is and has been the custom in the oil district of California to deem land covered by paper locations upon which the so-called annual assessment work has not been done to be abandoned and released from the effect of the notice. For instance, under the notice posted January 1, 1907, or any time during the year 1907, the locators would have, according to the custom prevailing and duly recognized in the district, until the 31st of

December, 1908, in which to do $100.00 worth of work on the property. In the event the work was not done, the rights under the location would lapse and the property would be open to relocation on the 1st of January, 1909. That was the custom in the field, and if you went out on the property and dug a trench, it did not make any difference what kind of a trench it was—four or five feet deep, or three or four or five feet long and four feet deep—and spent a hundred dollars on it, that constituted, in accordance with the custom of the district, one hundred dollars worth of work, and the locators' rights to the property were recognized by his neighbors and others.

I had no money during the years 1907 and 1908 with which to develop the property covered by the Chicago locations, and the locators did not advance nor offer to advance me any money for such purpose, and no work of any kind was done on any of the property, except the moving of some material on the northwest quarter of section 32 in the latter part of 1908.

I emphatically did not tell McLeod nor the California Midway Oil Company or anybody interested in the company or any contract for the development of section 32, prior to January, 1909, I was going to relocate the northwest quarter of the section in the name of the New York locators, for the reason that if I had they could have jumped the property or located it themselves. When I consulted Judge Claflin about the matter and asked him if there was any remedy, he said he did not know of any, but asked when the Chicago

locations would expire, and I told him in the 31st of December, 1908, and he said "You better arrange to relocate the property on the 1st of January, 1909". The first time McLeod knew of the new locations was at the interview in Claflin's office in the early part of January, 1909, and after they had been made. I watched the development on the northwest quarter of section 32, and had two reports thereon a week, because under the contract with McLeod, the work was to be for the benefit of the entire quarter section, and the locators whom I represented were interested in the north hundred acres thereof. From the time of my interview with McLeod in Claflin's office in January, 1909, and the making of the new contract I did not assert nor claim that any of the work done on the northwest quarter of the section after January 1, 1909, was made or done for the interest or benefit of the Chicago locators, and there was no purpose or intent to hold or claim the land for them. We considered that the Chicago locations were absolutely void and expired on the 31st of December, 1908, and of no effect because of error in the notices, and the fact that they were actually posted on the south half of the section and not on the property in question and as a matter of fact the contract of October, 1908, with McLeod was made concerning property on which no location notices had been posted, and the land was unlocated land as far as the Chicago locations were concerned. I never told the New York locators, nor authorized any one else to tell them, that I would give them any money or any

reward of any kind for signing the power of attorney, or because or the fact that they had signed it. At the time I obtained the New York powers of attorney I did not have in mind the location of any particular lands in the Midway field or the northwest quarter of section 32. At the time the transfer was made by me as attorney in fact for the New York locators to Claflin, and by Claflin to me individually I was indebted in a considerable sum for operations in the Midway field and had no security for the repayment to me of any money advanced or expended on behalf of the locations made in the names of the New York parties and my recollection of the transfer is that it was made for the purpose of convenience in handling the different agreements, in not having to sign the names of all the locators in event of any transfer or anything of that kind. That is the recollection I have of it now. I think the probabilities are that the suggestion of the transfer came from Claflin and I followed his advice, perhaps without asking him the reasons therefor. I did not claim to the Associated Oil Company in 1910 at the time of the negotiations or at any time that, by the conveyance to Claflin and from Claflin to me, I became the sole party in interest and that the New York locators did not have any right or claim to the property or the benefits to be derived therefrom, but I assured, and in fact told the parties that I was acting for the New York locators and in their behalf and so executed the instruments and deeds in that capacity. I had that in mind when I agreed that the holders of the apparent legal title would

execute declarations of trust that they held such title for and on behalf of the New York locators, and never remember making any statement or claim that I had any interest in the lands personally. The Associated Oil Company insisted upon a ratification from each of the thirty-two New York locators before it would pay the purchase price, and it retained a part thereof until the Darling estate had been administered and his interest in the locations obtained through the probate court. And in addition it insisted that deeds and conveyances or releases be obtained from Darling's legatees and heirs.

I admit that I made the statement to which my attention is called, as a witness in the case of United States v. Thirty-two Oil Company, in November, 1916, about the time I advised McLeod of the defects in the Chicago locations, and the arrangements we made about the relocation of the property, but I was in error in the statements. Before a witness is put in the stand, it is customary, I believe, for the attorney to talk the matter over with him, but that was not done in this instance. Here was a case where we went back from five to nine years—yes thirteen years—the attorney for the defense for whom I was supposed to be a witness never asked me one single question. I went on the stand in 1916 without preparation. I never had an opportunity to refresh my mind or anything in regard to any dates or anything connected with the property, and if there is any mistakes made, it is simply an error

in judgment or I had forgotten. I think it is a very simple thing for a man to forget. And again, I had the government of the United States on one side trying to prove the locators dummies, and an attorney on the other side who was trying to build up a case to sue me by the locators. Counsel on neither side had talked to me about the matter. There never was a time nor an occasion for me to use a dummy locator. It was something that had never occurred to me anywhere at any time. I never heard of such a thing until it was brought up about the time we were preparing to get the ratifications required by the contract with the Associated Oil Company. I had read of some timber cases where men had been employed to go out and locate lands for a consideration, and I appreciated that such an one was a dummy locator, but where a man had not received any money for the use of his name, if he was a bona fide citizen of the United States, I never realized that he was a dummy. That is the construction placed upon it by Mr. Hall and others in Washington connected with the government. One of the officials of the government criticised me for not giving the locators a larger amount of money. He said "If you had given him more money—if you had paid the locators more, why, then it would have looked different". Now, to my mind, whether you paid the locator for a location he made ten dollars or ten thousand dollars, really I could not see any difference.

The foregoing is a fair summary of the controlling facts in the case as admitted and shown by the evidence, as I understand them, and upon which the government makes practically three contentions, (1) that the New York locators were dummies or tools of McMurtry, and had no intention at the time they executed the powers of attorney that locations should be made for their benefit, but the powers of attorney were executed and delivered with the fraudulent purpose and intent on the part of the makers and McMurtry that they should be used in violation of the mining laws and to enable McMurtry to acquire for himself more mineral lands in one location than the laws permit. (2) That if the powers of attorney were in fact executed and delivered in good faith and for a lawful purpose, they were fraudulently used by McMurtry to make the locations for his individual benefit and not for his principals. (3) That the particular location in controversy in this suit was not made for the use and benefit of the named locators, but for the California Midway Oil Company, by enabling McMurtry to carry out his previous contract with Mrs. McLeod and others, under which it claims.

The first two questions may be considered together as they are governed by the same principles. There is so far no law of Congress or regulations made in pursuance thereof limiting the number of placer mining claims an individual or association of individuals may make. On the contrary, the policy of the government seems to be to encourage the development of its min-

eral resources and to offer every facility for that purpose. To that end the law declares that all valuable mineral deposits in lands belonging to the United States are to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law and according to the local customs or rules of miners in the several mining districts so far as applicable, and not inconsistent with the laws of the United States. (R. S. 2319.) Fraud or wrongdoing therefore is not to be inferred or imputed in this case solely because of the number of locations made. The right to possess or acquire mineral lands, however, is a privilege granted by Congress and can only be exercised within the limits prescribed in the grant. The law provides that no mining claim shall exceed twenty acres for an individual (Sec. 2331 R. S.) or one hundred and sixty acres for an association of eight persons (Sec. 2330 R. S.). Any device therefore whereby one person is to acquire more than twenty acres, or an association more than one hundred and sixty acres by one location is a violation of law, a fraud upon the government and without legal support. *(U. S. v. Brookshire Oil Co., 242 Fed. 718.)*

It is the government's postion in this case that it was the intention of the makers of the powers of attorney and of McMurtry to circumvent the law by permitting McMurtry to secure the location of more than twenty acres in one claim, and that there was in effect,

a conspiracy between McMurtry and the makers of the powers of attorney to violate the statute.

The question thus presented is one of fraud. There are certain well settled rules to guide the court in determining such an issue. Fraud is never presumed but must be established by clear, unequivocal and convincing proof. Proof which merely creates suspicion is not enough. "Fraud is not presumed" says Judge Story. "It must be clearly established. Suspicion is not enough. The balance of the testimony is not to be nicely weighed." *(Sanborn v. Stetson, 21 Fed Cases 315.)* And the Supreme Court of the United States says that "while certain circumstances will give rise to an inference of fraud, yet the law never presumes it. It devolves upon him who alleges fraud to show the same by satisfactory proof. The law presumes in the absence of evidence to the contrary that the business transactions of every man are done in good faith and for an honest purpose; and any one who alleges that such acts are done in bad faith or for a dishonest and fraudulent purpose takes upon himself the business of showing the same." (Jones v. Simpson, *116 U. S. 615.)* If the circumstances proven are just as consistent with honesty and good faith as with fraudulent intent the inference of fraud is not warranted. In short, where two inferences can be drawn from proven facts, one in favor of fair dealing and good faith and the other of a corrupt motive, it is the duty of the trier of fact to draw the inference favorable to good faith and fair dealing. (In re Hawkes, *204 Fed. 316;* Ryder v. Bam-

burger, *172 Cal. 797; 158 Pac. 753.)* It is, of course, not essential that fraud be established by direct and positive proof for that is often impossible. The circumstances proven may be sufficient to warrant a finding of fraud but in such case the evidence must be of such a nature as to be convincing and inconsistent with the presumption of honesty.

I am of the opinion that the government has not established the fraud charged within these rules. There are certainly two inferences which can be drawn from the testimony, one of which is in favor of good faith on the part of all parties concerned at the time the powers of attorney were executed and the locations made, and that is the crucial question in the case.

The evidence of the New York locators as well as that of McMurtry and his associates is clear that there was no expressed understanding or agreement at the time the powers of attorney were executed, or prior thereto or at any time, that they should be used for McMurtry for a fraudulent purpose or for any purpose other than to make, develop and dispose of mining locations for the use and benefit of the locators, and in my judgment such understanding is not to be inferred from the circumstances. But few if any of the signers knew McMurtry by sight or had any communication with him about the matter. They executed the powers of attorney at the request of either Thorn, Thickens or Powell, in whom they had the utmost confidence, and upon whose representations they relied in so doing. They were led to believe that McMurtry was an honest man

familiar with the mining laws, and that he intended to make locations for them in their names if he could find property open to entry. It is true they were not familiar with the mining laws and made no particular inquiry concerning same, nor after executing powers of attorney did they manifest any particular interest in what had been done, if anything, thereunder, but signed such papers and receipts, and accepted such sums of money as were presented and paid to them from time to time. All this may well have been because of their confidence in their principal and his associates, and reliance upon the statements and representations made to them.

The fact that their confidence was misplaced does not render their acts fraudulent and although McMurtry's conduct subsequent to the locations was not such as should have characterized the relations between a principal and his agent, he nevertheless at all times up to and for some time after the sale to the Associated Oil Company, and notwithstanding the endorsements on the checks and the other papers executed by the locators, treated them as the owners of the locations and dealt with them and the property as such. All contracts and conveyances made by him were made and executed in the name and for and on behalf of his principals. He recognized their rights or claim to the property by from time to time seeking and obtaining releases and acquittances from them, and by causing to be issued to them stock in the Pacific Oil Lands Company, the holding corporation, and obtaining their consent to the corpor-

ate meetings and distribution of dividends therein. In July, 1910, he freely acknowledged that notwithstanding previous conveyances made by and to him the property was in fact held in trust by the grantees for the locators, and was willing to execute and have executed declarations to that effect. In making the locations and subsequent contracts in reference thereto, the fair conclusion from the evidence in my judgment is that McMurtry was acting for and on behalf of his principals and with no intention at that time of fraudulently acquiring the land or the proceeds thereof for himself. It was not until it became apparent that a large sum of money could be realized from the transaction that his avarice or cupidity seems to have influenced him to appropriate to his own use the bulk thereof without accounting to his principals, and in violation of his trust. Clearly his conduct after location and discovery and sale of the property, however wrongful it may be, cannot relate back to and characterize as fraudulent the execution of the powers of attorney or the locations made thereunder. Evidence in relation thereto was only admissible and can only be considered insofar as it tends to establish a fraudulent purpose at the time of the locations. (U. S. v. Kettenbach, *208 Fed. 209.)* The locations were either fraudulent at the time they were made or not at all, and it is to that question the inquiry is to be confined. The law permits locations of mining claims in the names of persons not present. (Moore v. Hamerslag, 41 Pac. 805). When so made all the right or title any one can acquire by the location

vests in the persons located. The interest, whatever it is, thus acquired becomes theirs to dispose of as they please. (Whiting v. Straup, 95 Pac. 854). When therefor a location was made by McMurtry in the name of his New York principals they became immediately vested with whatever right or title such location gave, in the absence of fraud or bad faith, and such title was not changed or rendered fraudulent by the subsequent failure of McMurtry to account to them for the proceeds of the property disposed of by him under his power of attorney, or by any secret or undisclosed purpose he may have had with reference thereto.

I conclude therefore that upon the first two points the findings must be for the defendants.

Nor in my judgment is the claim that the particular location in controversy in this suit was for the benefit of the California Midway Oil Company, by enabling McMurtry to comply with his previous contract with Mrs. McLeod and others sustained by the testimony. The same question was raised in United States vs. Thirty-Two Oil Company (242 Fed. 730) involving the southeast quarter of section Thirty-two. The case was decided on another point but in the opinion it is said (P733) that "there can be no question from the evidence but what the alleged locations made in 1909 were not for the use and benefit of the named locators, but to enable McMurtry to consummate and carry out the provisions of a contract made by him with McLeod and others for the disposal of the property as heretofore stated." This observation was not necessary to

the decision. It was, however, based upon the undisputed evidence in the then pending case, in which McMurtry testified to the effect stated, but in the instance case his testimony is that since the trial of the former case he has verified his recollection of the matter from accessible data and that he was in error in his former testimony. That as a matter of fact the locations were not made to enable him to carry out his previous contract but because of an intention on his part to abandon the former locations and make new ones in the name of and for his New York principals, and neither the California Midway Oil Company or McLeod or his associates knew that the land was to be relocated until after the location had been made, and in this he is corroborated in the testimony of McLeod and others.

So that upon the record as it now stands and upon the testimony in the present case, it appears that the locations made in 1909 were for the use and benefit of the New York locators, and not for the purpose of enabling McMurtry to consummate a previous contract made by him as attorney in fact for the Chicago locators. The so-called Chicago locations of the property in controversy was but a paper location. No discovery had been made thereunder and no work done upon the property except the moving of some material thereon by the California Midway Company, and therefore no right as against the government had vested in the locators. The property was still open to peaceable relocation, so that when McMurtry, acting as attorney in fact for the Chicago locators, abandoned their loca-

tion and relocated in the name of the New York principals, the latter became, from the date of such locations, entitled to whatever rights were thus acquired, and that was the right to explore for valuable mineral deposit therein and to be protected while working towards discovery from forcible, fraudulent, surreptitious or clandestine intrusion upon their possession. (Union Oil Co. vs. Smith, S. C. March 31, 1910. Consolidated Mutual Oil, et al., vs. United States, 245 Fed. 524.)

Bill of complaint is therefore dismissed.